PETITION FOR WRIT OF CERTIORARI

SUBJECT INDEX

	Page
Statement of the Matter Involved	1
Jurisdiction	8
Questions Presented and Reasons Relied on for Allowing the Writ	9

APPENDIX

	Page
Schedule	I.
Harter Act (Title 46 U. S. C. §192)	II.
Limitation Statute (Title 46 U. S. C. §183)	III.
Sec. 2, Act of May 11, 1918 (Title 46 U. S. C., §223)	III.
Sec. 3, Act of May 11, 1918 (Title 46 U. S. C., §235)	IV.
Eight Hour Law (Title 46 U. S. C. §673)	IV.
Letter of July 14, 1939 from Department of Commerce	V.
Letter of June 7, 1913 from Treasury Department to Secretary of Commerce	VII.
Letter of May 8, 1913 to U. S. Collector of Customs from Association of Masters, Mates and Pilots	VIII.
Affidavit of R. R. Pierson, Superintendent of Alaska Steamship Company, dated May 27, 1913	VIII.
Letter of May 24, 1913 from Master of S. S. ALAMEDA to Superintendent of Alaska Steamship Company	X.
Letter of June 17, 1913 from Department of Commerce	X.
Letter of July 24, 1913 from Department to Collector of Customs	XI.

TABLE OF CASES

	Page
Butler v. Boston Steamship Co., 130 U. S. 527, 554 (1889)	4
Hartford & New York Transp. Co. v. Rogers & Hubbard Co., 47 F. (2d) 189, 191 (C. C. A. 2; 1931)	10
Hines v. Butler, 278 F. 877 (C. C. A. 4; 1921)	11
LaBourgogne, 210 U. S. 95, 122 (1908)	11
New York Marine No. 10, 109 F. (2d) 564 (C. C. A. 2; 1940)	12
Pennsylvania, The, 19 Wall. 125, 136 (1873)	6
Southern Pac. Co. v. United States, 72 F. (2d) 212, 215 (C. C. A. 2; 1934)	12
Virginia, The, 264 F. 986 (1920)	11

STATUTES CITED

	Page
Act of May 11, 1918, §2	3, 9, 10, 11
Act of May 11, 1918, §3	4, 9
Act of February 13, 1925	8
Act of June 25, 1936, §2	9
Harter Act, §3	2, 10
40 Stat. 549	3, 4
43 Stat. 938	8
Sec. 240 (a), Judicial Code	8
Title 28 U. S. C., §347(a)	8
Title 46 U. S. C., §183	2
Title 46 U. S. C., §192	2, 10
Title 46 U. S. C., §223	3
Title 46 U. S. C., §235	4

No.....

In the Supreme Court of the United States

OCTOBER TERM, 1940

ALASKA STEAMSHIP COMPANY, a corporation, Owner of the American Steamship DENALI,

Petitioner,

vs.

PACIFIC COAST COAL COMPANY, a corporation, *et al.*, and UNITED STATES OF AMERICA,

Respondents.

Petition for Writ of Certiorari

to the United States Circuit Court of Appeals for the Ninth Circuit.

MAY IT PLEASE THE COURT:

The petition of Alaska Steamship Company, a corporation, respectfully shows to this Honorable Court:

STATEMENT OF THE MATTER INVOLVED.

The steamer DENALI, owned and operated by petitioner as a common carrier in the Alaska trade and

having on board cargo owned by respondents, sailed from Seattle on May 16, 1935 at 5:43 A. M. On May 19, 1935 at 2:44 A. M., due to faulty navigation of her pilot, she stranded on a reef off Zayas Island in Caamano Passage and together with her cargo became a total loss. A petition was filed in the District Court by petitioner seeking exoneration from liability[1] or in the alternative limitation of liability[2] for cargo claims in excess of $360,000.00, resulting in a decision (R. 5462) and findings that petitioner was entitled to both exoneration and limitation (R. 5447) and a final decree dismissing the claims and exempting and discharging petitioner from liability (R. 5482). On appeal the Circuit Court of Appeals reversed the decree and denied both exoneration and limitation (R. 5608), Mathews, J., dissenting and holding that petitioner was entitled to limitation (R. 5625), and on rehearing the same result followed (R. 5632, 5651).

The District Court, as a basis for granting exoneration, found that petitioner had exercised due diligence to make the DENALI seaworthy, and further that she was in fact seaworthy at the commencement of the voyage (R. 5450), and that the sole cause of the stranding was faults or errors in navigation (R. 5460); and as a basis for limitation found that petitioner was without privity or knowledge thereof (R. 5460).

Respondents in opposition to the claimed right to exoneration and limitation, unsuccessfully urged in

---

[1] §3, Harter Act, Title 46 U. S. C., §192, App. II.

[2] Title 46 U. S. C., §183, App. III.

both courts that the DENALI was unseaworthy because of allegedly defective compasses and insufficient charts causatively contributing to the stranding (R. 5609). Respondents further urged that the DENALI was navigated in violation of the provisions of sec. 2 of the "three-watch" statute[3] in that her three mates were not divided into three equal watches of not to exceed 8 hours each day.[4]

The DENALI had a complement of licensed deck officers consisting of a master and three mates, as required by the statute and her certificate of inspection. In addition, and as a precautionary measure, she had an experienced pilot, being also a licensed master, who although not required by the statute was permitted by her certificate of inspection. The watches of these officers were so assigned as to provide two navigating officers at all times during the hours of darkness between 4:00 P. M. and 8:00 A. M.[5] and at the time of the stranding both the pilot and third mate were on watch, although only the latter was required by the statute.

The District Court held that the statute had not been violated, but if violated, found that the DENALI was nevertheless seaworthy (R. 5450, 5457). The Circuit Court of Appeals sustained respondents' contention that the statute had been violated, holding that the statute limited the navigating duties of the three mates

[3] "* * * such vessel * * * shall have in her service and on board three licensed mates, who shall stand in three watches while such vessel is being navigated * * *." Sec. 2 of the Act of May 11, 1918 (40 Stat. 549; Title 46 U. S. C., §223; App. III).

[4] Assignments Nos. 1, 2, 3, 8, 9, 12; R. 5512, 5513, 5515, 5516.

[5] Schedule, App. I.

to 8 hours a day served in periods of not exceeding 4 hours each (R. 5613).

The three mates on the DENALI were divided into watches by the master,[6] the second and third mates serving 8 hours navigating duty each day in periods of 6 hours and 2 hours each (R. 5477, Schedule App. I), the third mate serving 6 hours from 12:00 Midnight to 6:00 A. M. and 2 hours from 4:00 P. M. to 6:00 P. M. daily.[7] The first mate not only relieved the Master on his watches, but regularly did likewise with the pilot for short intervals (R. 1555, 2144, 2181); on the day of sailing he stood no regular navigating watch, being engaged in duties incidental to loading, but did relieve the master between 6:00 P. M. and 12:00 Midnight (R. 1613); on May 17 he stood a 4 hour watch alternating with the second and third mates and a 4 hour watch with the second mate;[8] on May 18 he stood a 4 hour watch alternating with the second and third mates (R. 2181). The pilot, whose hours of duty are properly governed by the 12 hour maximum fixed by sec. 3 of the statute[9] stood watch 12 hours a day in two periods of 6 hours each (12:00 Midnight to 6:00 A. M.; 12:00 Noon to 6:00 P. M.).

---

[6] It is the master's duty to select and station his crew. *Butler v. Boston Steamship Co.*, 130 U. S. 527, 554 (1889).

[7] R. 1607, 1608, 1610, 1612, 1836, 2179, 2216, 2323, 2338, 2339, 2412, 2413. The conclusion of the Circuit Court of Appeals that the third mate exceeded 8 hours watch duty is unsupported by the evidence.

[8] R. 1609, 2131, 2132, 2140, 2145, 2159, 2161, 2162, 2181, 2182.

[9] " * * * no licensed officer * * * shall be required to do duty * * * more than twelve hours of any twenty-four at sea * * *." Sec. 3, Act of May 11, 1918 (40 Stat. 549; Title 46 U. S. C., §235; App. IV).

The Circuit Court of Appeals held that the first mate failed to stand a navigating watch in compliance with the statute and arbitrarily held that therefore the pilot must be considered as a substitute for the first mate and as he stood a navigating watch in excess of 8 hours a day, he was standing watch in violation of the statute.

Sec. 2 of the statute relative to division of watches must, however, be applied only to the three mates, whereas the pilot is governed only by the maximum 12 hour provision of sec. 3 of the statute. There is nothing in the statute to support the holding that the watches must be served in periods not exceeding 4 hours each. The watch of paramount importance here is that in which the DENALI stranded. Assuming a violation of the statute by the manner in which the first mate stood his watches, there was no violation as to the pilot and third mate, and no possible causal connection between that violation and the stranding.

It therefore follows that in the watch of paramount importance two navigating officers were on duty, whereas only one was required by statute. If only the third mate had been on watch at the time of stranding there would have been no factual basis for the decision of the Circuit Court of Appeals. Because of the presence of the pilot, employed by petitioner as an added precaution, it has been erroneously found that the DENALI at the time of the stranding was being navigated in violation of the statute.

On the issue of exoneration the Circuit Court of Appeals held that a violation of the statute, without more, rendered the DENALI unseaworthy and being a customary violation, defeated the claim to exoneration from liability (R. 5624, 5625).

On the issue of limitation the Circuit Court of Appeals found that the stranding resulted from a "fault of navigation" (R. 5618) of which, of course, petitioner was without privity or knowledge, but found that petitioner had privity and knowledge of the violation of the statute by reason of the customary violation thereof, and the majority (the District Judge and one Circuit Judge opposed) further held that therefore limitation must be denied because petitioner had failed to show that the violation "*could not* have contributed to the stranding" (R. 5618). The imposition of this *extraordinary burden* of proof resulted from the misapplication by the majority of the so-called Pennsylvania rule. [10] Mathews, J., dissenting, held that the rule was inapplicable and that petitioner was only required to show by the ordinary burden of proof that the stranding occurred without its privity or knowledge and held that the evidence amply supported the District Court's finding that the sole cause of the stranding was due to faults or errors in navigation, of which petitioner was without privity or knowledge (R. 5629).

---

[10] *The Pennsylvania*, 19 Wall. 125, 136 (1873), which in a collision case transfers the burden of persuasion on the issue of causation to the vessel violating a statutory rule to prevent collisions, requiring the offending vessel to prove that the violation *was not* a contributory cause.

On the rehearing, in referring to this finding the majority states:

> "These holdings as to the 'sole' cause and absence of privity were based upon the lower court's erroneous decision that the Act requiring the mates to stand three watches had not been violated. With regard to the finding that the wreck was caused by 'faults or errors' in navigation, this is not disturbed by a finding that the Act had been violated by the owner and hence imposed on the owner the presumption and burden of proof of The Pennsylvania, 19 Wall. 125, 136, that the violation could not have caused or contributed to the fault or error in navigation, which presumption the owner had not overcome. Our holding was that it had not been shown that the violation was not such a direct or such a *contributing* cause." (R. 5634).

Thus apparently overlooking the following in the decision of the District Court made a part of its findings:

> " * * * even if it can be successfully contended that the Section 2 scale for division of watches obligates shipowners and that the owner has in this instance violated that section (a contention with which this court does not agree), the evidence here is clear and convincing that the stranding was not in fact and could not have been caused or contributed to by duration or improper division of the mates' watches, and I so find. In that situation the owner has fully performed the strict requirement of the law relating to the amount or degree of proof as announced by the Circuit Court of Appeals for the Ninth Circuit in Chicago-Silverpalm, 1937 A. M. C. 1427, at 1436, and by the Supreme Court in Lie v. San Francisco, etc. S. S. Co., 243 U. S. 291, at page 298." (R. 5478.)
>
> " * * *

" * * * although only one watch officer was required by law or for safe navigation, two watch officers, to-wit, Pilot Obert and Third Mate Lawton, were on watch in the pilothouse of the Denali as navigating officers from about midnight of May 18-19 until the time said vessel stranded at about 2:44 A. M. of May 19, 1935; that neither of said watch and navigating officers was fatigued from excessive labor or lacking in sufficient sleep or rest at the time of the stranding or at any time during the said voyage, and that the said stranding was not in fact and could not have been caused or contributed to by any fatigue, excessive labor, or insufficient sleep of the watch officers, or either of them, and that said stranding was not in fact and could not have been caused or contributed to by the duration or actual division of the mates' or navigating officers' watches." (R. 5457.)

JURISDICTION.

The jurisdiction of this court is invoked under sec. 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925; 43 Stat. 938, Title 28 U. S. C., §347(a).

The date of the judgment to be reviewed is June 30, 1939 (R. 5608, 5629, 5630). Within time allowed therefor by rule of court, and valid extension, a petition for rehearing was filed on August 29, 1939 and rehearing was granted by order entered on January 5, 1940 (R. 5631). The rehearing was finally disposed of after oral argument by opinion and dissenting opinion on rehearing entered and filed on June 7, 1940 (R. 5631, 5632, 5651).

QUESTIONS PRESENTED AND REASONS RELIED ON FOR ALLOWING THE WRIT.

1. The Circuit Court of Appeals has erroneously construed sec. 2 of the statute (§2 of the Act of May 11, 1918, App. III) to require a division of watches of the three mates so that the watch time of each mate will not exceed 8 hours a day, served in watch periods of not exceeding 4 hours each, and has erred in not limiting its application to the three mates and in applying the same to the pilot; and has erroneously construed sec. 3 of the statute (§3 of the Act of May 11, 1918, App. IV) by refusing to apply the same to the pilot; and has erroneously concluded that the third mate exceeded 8 hours watch duty a day.

The conclusion that the third mate exceeded 8 hours watch duty is wholly unsupported by the evidence. The erroneous application of sec. 2 of the statute to the pilot and the refusal to apply to him sec. 3 of the statute has resulted in an obvious miscarriage of justice by penalizing petitioner for employing and using an experienced pilot in addition to the required number of mates in the navigation of the DENALI, which should be corrected by this Court.

Although the statute (§§2 and 3 of the Act of May 11, 1918, App. III, IV) has been superseded insofar as the same is in conflict with the later statute establishing an 8 hour day for certain vessels,[11] the erroneous construction is likewise applicable to the later statute

[11] §2 of the Act of June 25, 1936, as amended; App. IV.

and would require service thereunder in watch periods of not exceeding 4 hours each, contrary to anything contained therein. This is an important question of maritime law which has not been, but should be settled by this Court.

2. The Circuit Court of Appeals has erroneously decided that a violation of the statute (§2 of the Act of May 11, 1918; App. III) or other manning statute, without more, renders a vessel unseaworthy and that where such violation is customary, exoneration under sec. 3 of the Harter Act must be denied (Title 46 U. S. C. §192; App. II).

In view of the increase in statutory requirements governing the operation of vessels, this is an important question of maritime law which has not been, but should be settled by this Court. The decision is in conflict with *Hartford & New York Transp. Co. v. Rogers & Hubbard Co.*, 47 F. (2d) 189, 191 (C. C. A. 2; 1931), and erroneously restricts the operation of sec. 3 of the Harter Act.

3. The Circuit Court of Appeals has erroneously decided that where there has been a customary violation of the statute (§2 of the Act of May 11, 1918; App. III) or other manning statute, then, without more, there must be a finding of privity and knowledge of such violation by petitioner.

In view of the increase in statutory requirements governing the operation of vessels, this is an important question of maritime law which has not been, but should be settled by this Court. The decision is in con-

flict with *The Virginia,* 264 F. 986 (1920), aff'd. in *Hines v. Butler,* 278 F. 877 (C. C. A. 4; 1921) and *LaBourgogne,* 210 U. S. 95, 122 (1908).

4. The majority of the Circuit Court of Appeals (the District Judge and one Circuit Judge opposed) has erroneously decided that where there has been a customary violation of the statute (§2 of the Act of May 11, 1918; App. III) or other manning statute, and a resulting finding of privity and knowledge of such violation therefrom, petitioner must, in addition to proving by the ordinary preponderance of the evidence that it was without privity or knowledge of the cause of the loss, in this case a fault or error in navigation, prove that such violation "*could not* have contributed to the stranding."

The decision of the majority results from a misapplication of the so-called Pennsylvania rule, being a procedural rule applicable only on the question of liability in a collision case. It transfers the burden of persuasion on the issue of causation to the vessel violating a statutory rule to prevent collisions by requiring the offending vessel to prove that the violation was not a contributory cause, failing which it is held liable, not because the violation was a contributory cause, but because it has failed to prove that it was not. The burden of persuasion is but the ordinary burden and is not the "extraordinary burden" requiring proof that the violation *could not* in the sense of could not by possibility, have been a contributory cause as applied by the majority.

This is not a collision case, nor is the question of liability at issue on the petition for limitation, thus making inappropriate the application of this procedural rule. The majority has erroneously applied the rule in a limitation case to add to the burden of petitioner to show that it was without privity or knowledge of the cause of the loss, thus in effect treating the rule as a presumption and giving the same weight as evidence.

The misinterpretation of the burden imposed under the rule and its extension and application in a non-collision case on the issue of the right to limitation of liability are questions of outstanding importance in the administration of the limitation statute, as well as the maritime law generally. Such application of the rule has been heretofore questioned,[12] and should be settled by this Court.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Ninth Circuit, commanding that court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its Docket No. 8963, "Pacific Coast Coal Company, a corporation, et al., Claimants. Appellants, vs. Alaska Steamship Company, a corporation, Owner

[12] *Southern Pac. Co. v. United States*, 72 F. (2d) 212, 215 (C. C. A. 2; 1934), but see *New York Marine No. 10*, 109 F. (2d) 564 (C. C. A. 2; 1940).

of the American Steamship "DENALI," Appellee, and United States of America, Appellant, vs. Alaska Steamship Company, a corporation, Owner of the American Steamship "DENALI," Appellee," and that the said judgment of the United States Circuit Court of Appeals for the Ninth Circuit may be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioner will ever pray.

Respectfully submitted,

ALASKA STEAMSHIP COMPANY,
a corporation, Petitioner,

By LAWRENCE BOGLE,
CASSIUS E. GATES,
EDWARD G. DOBRIN,

Counsel for Petitioner.

APPENDIX.

SCHEDULE.

May 16th:

6:00 A. M.

2nd Mate (2 hrs.) { *8:00 A. M.* } (6 hrs.) Master
10:00 A. M.
12:00 Noon

2:00 P. M. } (6 hrs.) Pilot
4:00 P. M.
3rd Mate (2 hrs.) { 6:00 P. M.

2nd Mate (6 hrs.) { 8:00 P. M. } (6 hrs.) Master
10:00 P. M.
12:00 Midnight

May 17th:

12:00 Midnight

3rd Mate (6 hrs.) { 2:00 A. M. } (6 hrs.) Pilot
4:00 A. M.
6:00 A. M.

2nd Mate (2 hrs.) { *8:00 A. M.* } (2 hrs.) Master

1st Mate (4 hrs.) { *10:00 A. M.*
12:00 Noon

2:00 P. M. } (6 hrs.) Pilot
4:00 P. M.
3rd Mate (2 hrs.) { 6:00 P. M.

2nd Mate (6 hrs.) { 8:00 P. M. } (4 hrs.) 1st Mate
10:00 P. M.
12:00 Midnight } (2 hrs.) Master

May 18th:

12:00 Midnight

3rd Mate	(6 hrs.)	2:00 A. M. 4:00 A. M. 6:00 A. M.	(6 hrs.) Pilot
2nd Mate	(2 hrs.)	*8:00 A. M.*	(2 hrs.) Master
1st Mate	(4 hrs.)	*10:00 A. M.* *12:00 Noon*	
3rd Mate	(2 hrs.)	*2:00 P. M.* *4:00 P. M.* 6:00 P. M.	(6 hrs.) Pilot
2nd Mate	(6 hrs.)	8:00 P. M. 10:00 P. M. 12:00 Midnight	(6 hrs.) Master

May 19th:

12:00 Midnight

3rd Mate	2:44 A. M. Stranding	Pilot

HARTER ACT—Title 46 U. S. C. §192:

"If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, * * * shall become or be held responsible for dam-

age or loss resulting from faults or errors in navigation or in the management of said vessel nor * * * be held liable for losses arising from dangers of the sea or other navigable waters, * * *."

LIMITATION STATUTE—Title 46 U. S. C. §183:

"The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

SEC. 2, ACT OF MAY 11, 1918—Title 46 U. S. C. §223:

"The board of local inspectors shall make an entry in the certificate of inspection of every ocean and coastwise seagoing merchant vessel of the United States propelled by machinery, and every ocean-going vessel carrying passengers, the minimum number of licensed deck officers required for her safe navigation according to the following scale:

"No such vessel shall be navigated unless she shall have on board and in her service one duly licensed master.

"Every such vessel of one thousand gross tons and over, propelled by machinery, shall have in her service and on board three licensed mates, who shall stand in three watches while such vessel is being navigated, unless such vessel is en-

gaged in a run of less than four hundred miles from the port of departure to the port of final destination, then such vessel shall have two licensed mates * * *." (May 11, 1918, c. 72, §2, 40 Stat. 549)

Note: Originally Sec. 2 of Act of March 3, 1913, 37 Stat. 733.

SEC. 3, ACT OF MAY 11, 1918—Title 46 U. S. C. §235:

"It shall be unlawful for the master, owner, agent, or other person having authority to permit an officer of any vessel to take charge of the deck watch of the vessel upon leaving or immediately after leaving port, unless such officer shall have had at least six hours off duty within the twelve hours immediately preceding the time of sailing, and no licensed officer on any ocean or coastwise vessel shall be required to do duty to exceed nine hours of any twenty-four while in port, including the date of arrival, or more than twelve hours of any twenty-four at sea, except in a case of emergency when life or property is endangered. Any violation of this section shall subject the person or persons guilty thereof to a penalty of $100." (May 11, 1918, c. 72, §3, 40 Stat. 549)

Note: Originally Sec. 3 of Act of March 3, 1913, 37 Stat. 733.

EIGHT HOUR LAW—Title 46 U. S. C. §673:

"In all merchant vessels of the United States of more than one hundred tons gross, excepting those navigating rivers, harbors, lakes (other than Great Lakes), bays, sounds, bayous, and canals, exclusively, the licensed officers and sailors, coal passers, firemen, oilers, and water tenders shall, while at sea, be divided into at least three watches, which shall be kept on duty successively for the performance of ordinary work incident to the sailing and management of the vessel. * * * nor

shall any licensed officer or seaman in the deck or engine department be required to work more than eight hours in one day * * *. While such vessel is in a safe harbor no seaman shall be required to do any unnecessary work on Sundays or the following-named days: New Year's Day, the Fourth of July, Labor Day, Thanksgiving Day, and Christmas Day, but this shall not prevent the dispatch of a vessel on regular schedule or when ready to proceed on her voyage. And at all times while such vessel is in a safe harbor, eight hours, inclusive of the anchor watch, shall constitute a day's work. Whenever the master of any vessel shall fail to comply with this section and the regulation issued thereunder, the owner shall be liable to a penalty not to exceed $500, and the seamen shall be entitled to discharge from such vessel and to receive the wages earned. * * * ". (June 25, 1936, c. 816, §2, 49 Stat. 1934; June 23, 1938, c. 597, 52 Stat. 944.)

Note: The portion omitted was in part added by the Act of June 23, 1938.

DEPARTMENT OF COMMERCE
Bureau of
Marine Inspection and Navigation
Washington

July 14, 1939

In Reply Refer To
102.3-6

"Bogle, Bogle & Gates
6th Floor Central Building
Seattle, Washington

Gentlemen:

Reference is made to your letter of July 8, 1939, wherein you discuss the provisions of Sections 2 and 3 of the Act of May 11, 1918, with particular reference to the manner in which the watches of licensed officers, employed on vessels of the United States, should be divided, and the hours of labor of licensed officers on vessels of the United States.

In reply to your communication, your attention is called to the provisions of Section 2 of the Act of March 4, 1915, as amended by the Acts of June 25, 1936, and June 23, 1938, which are set forth at length in the attached Bureau Circular Letter No. 221, under date of August 17, 1938.

It will be observed, upon a review of this statute, that licensed officers employed on the merchant vessels of the United States of more than 100 tons gross, with certain exceptions, shall, while at sea, be divided into at least three watches, which shall be kept on duty successively for the performance of ordinary work incident to the sailing and management of the vessel.

It will be further observed that the hours of labor of licensed officers are limited to eight hours in one day.

The Bureau is of the opinion that inasmuch as the provisions of the Act of May 11, 1918, are partially in conflict with the provisions of the Act of March 4, 1915, as amended, it would appear that so much of the Act of May 11, 1918, which is in conflict with the subsequent Act, has been superseded by such subsequent Act. Hence, the present law governing the watches and hours of labor of licensed officers would appear to be that their watches must be equally divided and successive; further, that licensed officers cannot be required to work more than eight hours in one day, counting the day as starting at midnight and ending at midnight.

It should be pointed out that while the watches of licensed officers must be equally divided and successive, there is no statutory requirement which establishes that these watches must be four hours on and eight hours off. Under the present statute, the watches may be set in any manner which the employer deems expedient, so long as they are equally divided and successive, and the licensed officers are not required to work more than eight hours in one day.

Sincerely yours,

(Sgd) ALLAN D. JONES

Assistant Director."

(Seal)
Office of the Collector
Address all communications
for this office to the Collector

TREASURY DEPARTMENT
United States Customs Service
Port of Port Townsend, Wash.

June 7, 1913.

The Secretary of Commerce,
Washington, D. C.

Sir:

I have the honor to transmit herewith the application of R. R. Pierson, Superintendent of the Alaska Steamship Co., and statement of Fred Warner, for relief from a penalty of $500. for an alleged violation of Section 4463, R. S., Section 2, Act of March 3, 1913, in that the American Steamship Alameda, owned by said company and operated in charge of Fred Warner, leaving Seattle for Alaska on April 19, 1913, was operated with two mates on board who stood watches of more than eight consecutive hours, as per complaint of P. Mullen, Secretary of Puget Sound Harbor No. 16, American Association of Masters, Mates and Pilots. (Fines Case No. 1222)

The applicant makes affidavit that on the voyage in question three mates (Deery, Brelund and Heldt) stood three watches of four hours on and eight hours off; that two special pilots (Jordan and Hansson) who possess special knowledge as to the inside passages of the coast of British Columbia and Alaska not possessed by the general run of mates, stood special watch six hours on and six hours off, or a maximum of twelve hours per day; further that taking the trip as a whole, the average number of hours which each pilot actually stood watch would only average a little over nine hours a day, as the pilots do not handle cargo, and as soon as the engines are rung off after making a landing the pilot may go below; etc.

The fine in this case has not been paid, and all papers in the case are forwarded for such action as the Department may deem advisable.

Respectfully,

F. C. HARPER,
Collector.

c
enc

Puget Sound Harbor
No. 16
(Incorporated)
J. E. BRINKER, PRESIDENT

AMERICAN ASSOCIATION OF MASTERS, MATES AND PILOTS

Seattle, Washington, May 8, 1913.

U. S. Collector of Customs,
Seattle, Washington.

Dear Sir:

Upon information and belief I herewith charge the master, owners or others interested in the Steamship Alameda with navigating said vessel unlawfully in the following particular:

That on the voyage made by said vessel leaving the port of Seattle, April 19, 1913 and returning May 2, 1913, the master Fred. Warner permitted two mates J. F. Jordon and R. Hansson, to stand in two watches while such vessel was being navigated, contrary to the Revised Statutes of the United States, Section 4463, as amended by act approved March 3, 1913, section 2 thereof.

I would request that the penalty required by law be imposed at once.

P. MULLEN
Secretary Puget Sound Harbor No. 16, American Association of Masters Mates and Pilots

Subscribed and sworn to before me this
8th day of May, 1913.

GEORGE A. CUSTER
Notary Public in and for the State of Washington, residing at Seattle

---

State of Washington,
County of King—ss.:

R. R. Pierson, being first duly sworn on oath, deposes and says:

That he is Superintendent of the Alaska Steamship Co. operating the steamer Alameda.

That on the departure of said steamer Alameda from Seattle, April 19th, said steamer carried in accordance with the requirements of her inspection certificate the following men as Mates at the salaries shown opposite their names:

J. C. Deery, First Officer	$100.00 per month,
O. Brelund, Second Officer	85.00 per month,
R. Heldt, Third Officer	70.00 per month.

That in addition to the above Mates two special pilots were carried as follows:—

J. F. Jordan	$150.00 per month,
R. Hansson	150.00 per month.

The two men last above named possess special knowledge as to the inside passages of the Coast of British Columbia and Alaska not possessed by the general run of Mates, and for this special knowledge they were paid extra compensation.

On said voyage of the Alameda the three Mates (Deery, Brelund, and Heldt) stood three watches of four hours on and eight hours off. The two special pilots stood special watch six hours on and six hours off or a maximum of 12 hours per day following a custom long in vogue in the Alaska service.

In view of the provision in Paragraph 3 of Section 4463 providing a maximum of 12 hours work out of any 24 hours at sea, we have felt that we were within the law in following the course described above in the case of special pilots.

This deponent is informed and verily believes that taking the trip as a whole, the average number of hours which each pilot actually stood watch would only average a little over 9 hours a day as the pilots do not handle cargo, and as soon as the engines are rung off after making a landing, the pilot may go below. In this way it often happens that nearly all, or all, of a single watch of 6 hours will be spent at the dock during which a pilot of course is not on duty, although his hours of watch are running just the same. In other words, if he comes on watch at 6 A. M. and the vessel arrives at Ketchikan at 8 A. M. sailing at 1 P. M. the first pilot would only work two hours on that watch, and the second pilot would come on duty at noon, but would not commence work until 1 o'clock, then if the ship called at Kassan cannery at 2 o'clock and discharged cargo until 6 P. M. the second pilot would have only worked one hour on his watch. Thus it happens that in any round trip the pilots do not average but little more than 9 hours work in each 24 hours, and as Paragraph 3 specifically permits 12 hours work at sea, it would not seem that a hardship had been worked on the pilots during this trip of the Alameda.

Attached to this affidavit and marked "Exhibit A" is a letter signed by Capt. Fred Warner, Master of the steamer Alameda, which is made a part hereof.

Further deponent saith not.

R. R. Pierson.

Subscribed and sworn to before me
this 27th day of May, 1913:

J. C. Harris
Notary Public in and for the State of
Washington residing at Seattle.

ALASKA STEAMSHIP COMPANY

Mr. R. R. Pierson,
Superintendent, Pier 2.

Seattle, Wash. May 24, 1913.

Dear Sir:—

Replying to your letter of May 16th. regarding charges preferred by the Customs authorities as to violation of Paragraph 2, Section 4463, which prescribed a penalty of $100.00 against the owner of the vessel for failure to carry three licensed mates who shall stand three watches while vessel is being navigated.

I beg to state that my three officers worked four hours on and eight hours off during the trip leaving Seattle April 19th. I also carried two extra mates to act as pilots for the inside waters of Alaska, who stood watch and watch 6 hours on and 6 hours off. These pilots were accompanied on the bridge by one of the three mates who stood four hours on and eight hours off. As the ship's certificate only calls for three mates, I thought I could work the pilots to the best advantage of myself and the ship subject to the 12 hour per day maximum provided in Section 3 of the "Hardy Act." As a matter of fact the average number of hours worked each day by the pilots, taking the entire trip including stops in ports during which the pilots were not on duty, was but little over nine hours.

Yours truly,

FRED WARNER
Master SS Alameda.

CC
REC
67817-N

June 14, 1913.

Respectfully referred to the Supervising Inspector General, Steamboat Inspection Service, for expression of opinion and return of papers to this Bureau.

A. I. TYRER
Acting Commissioner.

Port: Port Townsend, Wash.
Steamship "Alameda."

Aye.

In Reply Refer to
File No. 58748

DEPARTMENT OF COMMERCE
Steamboat—Inspection Service
Washington

June 17, 1913.

Respectfully returned to the Commissioner of Navigation, Department of Commerce, with the opinion that there has been no violation of the law in this case.

From the statement of the Superintendent of the Alaska Steamship Company, owners of this vessel, and, also, of Captain Warner, the master, it would seem that this steamer carries five mates, three of whom stand a regular bridge watch of four hours on and eight hours off, and the other two mates act as pilots in addition to the mates who are standing regular watches, and are with them on the bridge; the pilots, or rather the two additional mates acting as pilots, standing regular watches of six hours on and off.

It does seem to me that this complaint is farfetched, and should not for a moment be considered, as there is no doubt that the ship is more than fully meeting the requirements of the law.

I recommend the total remission of the penalty, as I am firmly of the opinion that none has been incurred.

GEO. UHLER

S. S. "Alameda",
Port Townsend, Washington.

67817-N

Sir: July 24, 1913

The Department has received your letter of June 7, last, transmitting the application of R. R. Pierson, Superintendent of the Alaska Steamship Company, for relief from a penalty of $500 alleged to have been incurred in the case of the steamer "ALAMEDA", for violation of section 4463 R. S., in that the licensed mates stood watches of more than eight consecutive hours.

It appears that this vessel carried three licensed mates and in addition two special pilots who had knowledge of the inside passage and were paid extra compensation because of this knowledge. Three of the mates stood watches of four hours on and eight hours off. The two special pilots stood special watch six hours on and six hours off or twelve hours per day following a custom long in vogue in the Alaska service. Taking the trip as a whole the average number of hours which each pilot stood watch was a little over nine hours per day and as they do not handle cargo they go below as soon as the vessel makes a landing. In this way it happens that nearly all of a single watch of six hours will be spent at the dock during which a pilot is not on duty although his hours of watch are running.

This vessel carried five mates and in the opinion of the Department, the vessel was fully manned as required by law. The circumstances of the case do not justify a penalty and the same is hereby remitted.

Respectfully,
(sg'd) E. F. SWEET
Acting Secretary.

Collector of Customs,
Seattle, Washington.
(Rubber stamp partly illegible)

No.....

In the Supreme Court of the United States

OCTOBER TERM, 1940

ALASKA STEAMSHIP COMPANY, a corporation, Owner of the American Steamship DENALI,

Petitioner,

vs.

PACIFIC COAST COAL COMPANY, a corporation, *et al.*, and UNITED STATES OF AMERICA,

Respondents.

Brief in Support of Petition for Writ of Certiorari

LAWRENCE BOGLE,
CASSIUS E. GATES,
EDWARD G. DOBRIN,
Counsel for Petitioner.

Office and Post Office Address:
603 Central Building,
Seattle, Washington.

IVY PRESS, SEATTLE

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

SUBJECT INDEX

	Page
I. Opinions of the Courts Below	1
II. Jurisdiction	2
III. Statement of the Case	2
IV. Assignments of Error	2
Argument	3
Summary of Argument	3
The "Three-Watch" Statute was not Violated	4
Exoneration from Liability Should have been Granted	9
Limitation of Liability Should have been Granted	14
Petitioner was Without Privity or Knowledge of the Alleged Violation of the Statute	14
The Majority has Misconstrued and Misapplied the Pennsylvania Rule	18

TABLES OF CASES

	Page
Amer. Mcht. Marine Ins. Co. v. Liberty S. & G. Co., 282 F. 514 (C. C. A. 3; 1922)	30
Baymead, The, 88 F. (2d) 144, 147 (C. C. A. 9; 1937)	26
Belden v. Chase, 150 U. S. 674, 699 (1893)	29
Blue Jacket, The, 144 U. S. 371, 389 (1892)	8
Buckleigh, The, 31 F. (2d) 241, 243 (C. C. A. 2; 1929)	13
Calvert, The, 37 F. (2d) 355, 358 (D. C. Md., 1929)	33
Capitol Trans. Co. v. Cambria Steel Co., 249 U. S. 334, 336 (1919)	16
Carbonero, The, 106 F. 329, 335 (C. C. A. 1; 1901)	33
Central Vermont Ry. Co. v. Bethune, 206 F. 868, 876 (C. C. A. 1; 1913)	33
Chase, The M. M., 37 F. 708, 713 (D. C. N. Y., 1889)	32
City of Washington, The, 2 Otto 31, 36 (1875)	22
Clapp v. Young, Fed Cas. No. 2786 (D. C. Mass., 1843)	27
Cleary Bros. v. Port Reading R. Co., 29 F. (2d) 495, 498 (C. C. A. 2; 1928)	26
Colima, The, 82 F. 665 (D. C. N. Y., 1897)	33
Commonwealth, The, 31 F. (2d) 142 (D. C. Mass., 1929)	33
Coventina. The, 52 F. 156, 158 (D. C. N. Y., 1892)	32
Doris Kellogg, The, 18 F. Supp. 159, 164 (D. C. N. Y., 1937) aff'd. 94 F. (2d) 1015 (C. C. A. 2; 1938)	34
Del Vecchio v. Bowers, 296 U. S. 280, 286 (1935)	35
Denali, The, 23 F. Supp. 145 (1938); 105 F. (2d) 413 (1939); 112 F. (2d) 952 (Adv. Op., 1940)	1, 2
Domira, The, 49 F. (2d) 324, 327 (D. C. N. Y., 1931)	25
Dorrington v. City of Detroit, 223 F. 232 (C. C. A. 6; 1915)	32
Dougherty v. Steamer Franconia, 3 F. 397, 403 (D. C. N. Y., 1880)	25

Page

Duke of Buccleuch, The, 15 P. D. 86, S. C. 1. App. Cas. (1891) 310.. 24
Earle & Stoddard v. Ellerman's Wilson Line, 287 U. S. 420, 425 (1932).... 36
84-H, The, 296 F. 427 (C. C. A. 2; 1923).... 33
El Sol, The, 45 F. (2d) 852, 855 (D. C. N. Y., 1930).... 34
Emily, The, Fed. Cas. No. 4453 (D. C. N. Y., 1845).... 27
Europa, The, 11 Asp. M. C. (N. S.) 19, 20 (1907).... 26
Fanny M. Carvill, The, 13 App. Cas. 455 n. (1875).... 24
Fenham, The, 23 L. T. 329 (1870).... 21
Flint & P. M. R. Co. v. Marine Ins. Co., 71 F. 210, 216 (C. C. Mich., 1895).... 30
Hartford & New York Transp. Co. v. Rogers & Hubbard Co., 47 F. (2d) 189, 191 (C. C. A. 2; 1931).... 4, 10
Hines v. Butler, 278 F. 877 (C. C. A. 4; 1921).... 4, 18
Indien, The, 71 F. (2d) 752, 756 (C. C. A. 9; 1934).... 9
In re Rapid Transit Ferry Co., 124 F. 786 (D. C. N. Y., 1903).... 34
Kitsap County Transp. Co. v. Harvey, 15 F. (2d) 166, 168 (C. C. A. 9; 1926).... 17
LaBourgogne, 210 U. S. 95, 122 (1908).... 4, 17, 18
Leathem Smith-Putnam Nav. Co. v. National U. F. Ins. Co., 96 F. (2d) 923, 928 (1938).... 30
Lie v. San Francisco & Portland S. S. Co., 243 U. S. 291 (1917)..19, 29
Lincoln v. French, 105 U. S. 614, 617 (1881).... 35
Lord v. Goodall, 15 Fed. Cas. 884, 887 (C. C. Cal., 1877).... 33
Love Bird, The, 6 P. D. 80 (1881).... 24
Mabel The, 35 F. (2d) 721, 732 (C. C. A. 2; 1929).... 25
Martello, The, 153 U. S. 64, 74 (1893).... 21, 24, 29
Material Service, The, 1937 A. M. C. 925 (D. C. Wis., 1937).... 30
Mintz v. Baldwin, 289 U. S. 346, 351 (1933).... 13
M'Lanahan v. The Universal Insurance Co., 1 Pet. 170, 184 (1828) 9
Moore v. American Transp. Co., 24 How. 1, 39 (1860).... 15
Nacoochee, The, 137 U. S. 330, 341 (1890).... 8
New York & Liverpool U. S. Mail S. S. Co. v. Rumball, 21 How. 372, 383, 384 (1858).... 27
New York Life Ins. Co. v. Gamer, 303 U. S. 161 (1938).... 35
New York Marine No. 10, 109 F. (2d) 564 (C. C. A. 2; 1940).... 36
North Star, The, 255 F. 955 (C. C. A. 2; 1919).... 8
Norwegian Nitrogen Prod. Co. v. U. S., 288 U. S. 294, 315 (1933).... 13
Pennsylvania, The, 23 L. T. 55 (1870).... 21
Pennsylvania, The, 19 Wall. 125 (1873).... 19, 20
People's Coal Co. v. Second Pool Coal Co., 181 F. 609 (D. C. Pa., 1910).... 32
Pillsbury Flour Mills Co. v. Becker S. S. Co., 49 F. (2d) 648, 650 (D. C. N. Y., 1931).... 9
Point Brava, The, 1 F. Supp. 366, 368 (D. C. Cal., 1932).... 11
Prince v. Eastern S. S. Co., 109 Me. 395, 84 Atl. 894, 896 (1912).... 22

	Page
Princess Schpia, The, 61 F. (2d) 339, 347 (C. C. A. 9; 1932)	33
Providence & New York S. S. Co. v. Hill Mfg. Co., 109 U. S. 578, 588, 589 (1883)	16
Providence, The, 282 F. 658, 664, 665 (D. C. R. I., 1922)	25
Republic of France v. French Overseas Corp., 277 U. S. 323, 334 (1928)	26
Richelieu Nav. Co. v. Boston Ins. Co., 136 U. S. 408, 422 (1890)	22, 29, 30
Rose Standish, The, 26 F. (2d) 480 (D. C. Mass., 1928)	33
Scotland, The, 105 U. S. 24, 33 (1881)	37
Southern Pac. Co. v. United States, 72 F. (2d) 212, 215 (C. C. A. 2; 1934)	34, 36
St. John v. Paine, 10 How. 557, 583, 584 (1850)	27
St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 265, 281, 282 (1913)	28
Suduffco, The, 33 F. (2d) 775, 776 (D. C. N. Y., 1929)	34
Sylvia, The, 171 U. S. 462, 465 (1898)	9
United States v. Chicago, N. S. & M. R. Co., 288 U. S. 1, 13 (1933)	13
United States v. Ross, 92 U. S. 281, 283 (1875)	35
Virginia, The, 264 F. 986, 996, 997 (D. C. Md., 1920)	4, 17
Waring v. Clarke, 5 How. 441, 465 (1846)	22
White Oak Transp. Co. v. Boston, Cape Cod & N. Y. C. Co., 258 U. S. 341, 344 (1922)	31
Wildcroft, The, 201 U. S. 378, 386 (1906)	9
Wyomissing, The, 72 F. (2d) 834, 838 (C. C. A. 3; 1934)	8

STATUTES CITED

	Page
Act of April 29, 1864, c. 69	27
Act of May 11, 1918, §2	2, 3, 5
Act of May 11, 1918, §3	2, 3, 5
Act of February 13, 1925	2
Act of June 25, 1936, §2	5
1 & 2 Geo. 5	25
Harter Act, §3	3, 4, 9, 14
Judicial Code, Sec. 240(a)	2
Maritime Conventions Act, 1911	25
Merchant Marine Shipping Act, 1873, §17	23
Merchant Shipping Act, 1894, §419(4)	23, 25
Rev. Stat. §4233	27
13 Stat. 58	27
43 Stat. 938	2
Title 28 U. S. C. §347(a)	2
Title 46 U. S. C. §192	3
36 and 37 Vict. c. 85	23

TEXTS CITED

	Page
Benedict on Admiralty, (5th ed., 1925) pp. 594, 596	33
Carver, Carriage of Goods by Sea (8th ed., 1928) p. 21	26
20 R. C. L. 43, §37	26
45 C. J. 901, §478	26
45 C. J. 902, §479	26
45 C. J. 1170, §752	26
7 C. J. S. 980, §142	13
Flanders, The Law of Shipping (1853), pp. 199, 288, 289	26
LaBoyteaux, Rules of the Road at Sea (1920), pp. 1, 2, 6	27
Marsden's Collisions at Sea (9th ed., 1934), pp. 2, 8, 55, 65	23, 25, 27
Paasch, Illustrated Marine Encyclopedia, Antwerp, 1890, p. 300	5
Parsons on Maritime Law (1859), Vol. I, pp. 191, 193 n.	27, 28
2 Restatement of Law on Torts, §286	26
Shearman & Redfield Law of Negligence (6th ed., 1913), §37	26

MISCELLANEOUS AUTHORITIES

	Page
Congressional Record, Vol. 50, Part 7, p. 5674	7
Hearings, House Committee on Merchant Marine and Fisheries on H. R. 20285 (62nd Cong., 2nd Sess.) Mar. 7, 1912	6
Hearings, Senate Committee on Commerce on H. R. 23676 (62nd Cong., 3rd Sess.) Part No. 2, Jan. 14, 1913	6
Hearings, Subcommittee of Senate Committee on Commerce on H. R. 23673 (62nd Cong., 3rd Sess.) Parts 2, 3, 6, 8, 9, 11, 12	6
International Labor Conference, Preliminary Report, 13th Sess., Geneva, 1929	7

No.....

In the Supreme Court of the United States

OCTOBER TERM, 1940

ALASKA STEAMSHIP COMPANY, a corporation, Owner of the American Steamship DENALI,

Petitioner,

vs.

PACIFIC COAST COAL COMPANY, a corporation, *et al.*, and UNITED STATES OF AMERICA,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I. OPINIONS OF THE COURTS BELOW.

The opinion and dissenting opinion of the Circuit Court of Appeals for the Ninth Circuit (R. 5608) are reported as *The Denali,* in 105 F. (2d) 413 (1939), the opinion and dissenting opinion on rehearing (R. 5632) are reported in 112 F. (2d) 952, (Adv. Op., 1940). The

opinion of the District Court (R. 5463) is reported as *The Denali,* in 23 F. Supp. 145 (1938).

II. JURISDICTION.

The jurisdiction of this Court is invoked under sec. 240(a) of the Judicial Code, as amended by the Act of February 13, 1925; 43 Stat. 938, Title 28 U. S. C., §347(a).

III. STATEMENT OF THE CASE.

Except as more detailed reference to the record is required for a complete discussion of the assignments of error and questions presented, the statement of the matter involved as set forth in the petition (p. 1) is believed sufficient and is adopted in the interest of brevity.

IV. ASSIGNMENTS OF ERROR.

The Circuit Court of Appeals for the Ninth Circuit erred in the following particulars:

1. In construing sec. 2 of the statute (§2 of the Act of May 11, 1918; App. III) to require a division of watches of the three mates so that the watch time of each mate will not exceed 8 hours a day, served in watch periods of not exceeding 4 hours each, and in not limiting its application to the three mates and in applying the same to the pilot; and in construing sec. 3 of the statute (§3 of the Act of May 11, 1918; App. IV) by refusing to apply the same to the pilot; and in concluding that the third mate exceeded 8 hours watch duty a day.

2. In deciding that a violation of the statute (§2 of the Act of May 11, 1918; App. III) or other manning statute, without more, rendered the DENALI unseaworthy and that where such violation is customary, exoneration under sec. 3 of the Harter Act must be denied (Title 46 U. S. C., §192; App. II).

3. In deciding that where there has been a customary violation of the statute (§2 of the Act of May 11, 1918; App. III) or other manning statute, then, without more, there must be a finding of privity and knowledge of such violation.

4. In deciding that where there has been a customary violation of the statute (§2 of the Act of May 11, 1918; App. III) or other manning statute, and a resulting finding of privity and knowledge of such violation therefrom, petitioner must in addition to proving by the ordinary preponderance of the evidence that it was without privity or knowledge of the cause of the loss, in this case a fault or error in navigation, prove that such violation "could not have contributed to the stranding."

5. In denying exoneration from liability.

6. In denying limitation of liability.

ARGUMENT.

SUMMARY OF ARGUMENT.

1. The "three-watch" statute was not violated.

2. Exoneration from liability should have been granted.

(a) The DENALI was in fact seaworthy. The holding that the mere violation of the statute ren-

dered her unseaworthy is in conflict with *Hartford & New York Transp. Co. v. Rogers & Hubbard Co.*, 47 F. (2d) 189, 191 (C. C. A. 2; 1931), and an erroneous restriction of the operation of sec. 3 of the Harter Act.

(b) Due diligence was exercised to make the DENALI seaworthy.

3. Limitation of liability should have been granted.

(a) Petitioner was without privity or knowledge of the alleged violation of the statute. The holding that a customary violation of the statute requires a finding of privity and knowledge is in conflict with *The Virginia,* 264 F. 986 (1920), aff'd. in *Hines v. Butler,* 278 F. 877 (C. C. A. 4; 1921) and *LaBourgogne,* 210 U. S. 95, 122 (1908).

(b) The majority has misconstrued and misapplied the Pennsylvania rule. It is not required that petitioner prove that the violation of the statute could not, in the sense of could not by possibility, have contributed to the stranding.

THE "THREE-WATCH" STATUTE WAS NOT VIOLATED.

The statute had been a part of the law governing the navigation of vessels such as the DENALI for 22 years prior to her stranding, but has never heretofore been the subject of judicial inquiry on the points now at issue.

The term "watch" in maritime parlance has two meanings, one refers to the divisions of time when a

certain portion of the vessel's personnel is on duty, the other refers to the men themselves when so employed.[1] Here we are primarily interested in the term "watch" as it applies to the divisions of time. Prior to the original enactment of the statute in 1913 there were no statutory requirements respecting watches or hours of duty. Both sections of the statute, sec. 2 relative to divisions of watches, and sec. 3 relative to hours of duty, must be considered together and require no more than that the total time of navigating duty be equally divided among the three mates, no one division of such duty to exceed 12 hours in any 24-hour period. Sec. 2 of the statute applies only to the three mates and does not apply to any other officers carried by the vessel. Dividing the entire time of navigating duty into three equal periods will always result in each mate serving an average of 8 hours in each 24-hour period.[2] There is a vital difference between an average 8 hours work in 24, as thus effected, and "8 hours a day" as stated by the Circuit Court of Appeals. It was not until 1936 that an 8-hour day was established.[3] The statute established a maximum 12-hour day, not a

---

[1] *Paasch, Illustrated Marine Encyclopedia, Antwerp,* 1890, p. 300.

[2] The entire time of duty (reckoned from midnight to midnight or other starting time) will always be 24 hours or multiples thereof and if the time be equally divided irrespective of the length of each division or watch (provided the same must not exceed 12 hours) the average length of time served by each mate in a 24-hour period will be determined by dividing the full period, say 72 hours, by the number of 24-hour periods, in this instance three, and again dividing by the number of mates, in this instance three, and the result will always be an average of 8 hours in each 24-hour period.

[3] §2 of the Act of June 25, 1936, as amended, App. IV.

maximum 8-hour day. There is nothing in the statute to warrant the construction that the 12-hour maximum day does not apply to the three mates required to be divided into three watches.

The Circuit Court of Appeals in addition to erroneously construing the statute to fix a maximum of 8 hours duty a day for the three mates, has further read into the statute the limitation that the 8 hours duty must be served in periods of not to exceed 4 hours each. This results from the statement that by immemorial Anglo Saxon maritime custom the time period of a watch never exceeds 4 hours (R. 5612). There is no testimony in the record to support such statement, on the contrary watch periods of 6 hours as employed on the DENALI, were shown to be customary in the Alaska trade both on petitioner's vessels and others and the District Court found that the "watches as set and divided * * * were in fact in accordance with good, customary and safe practice in the Alaska trade." (R. 5457). It also appears that at the time of the original enactment of the statute in 1913, watch periods of 6 hours and more were customary.[4] A study of com-

---

[4] Testimony before the Senate Committee on Commerce (62nd Cong. 3rd Sess. No. 2, Jan. 14, 1913) on H. R. 23676 which became the original "three-watch" statute, showed a custom of standing watches of 6 hours duration on the Pacific Coast (p. 102), Great Lakes (pp. 88, 90, 92, 120) and on ocean-going tugs (pp. 120, 126, 131, 132, 140). Testimony before the House Committee on Merchant Marine and Fisheries (62nd Cong. 2nd Sess., Mar. 7, 1912) on H. R. 20285 the provisions of which became H. R. 23676 showed a custom of standing watches of 6 hours duration on seagoing tugs (p. 26), Atlantic coastwise vessels (p. 34), Atlantic seagoing tugs (p. 41) and on vessels generally (pp. 52, 61, 88, 90, 92, 97, 112, 117, 119, 124, 131, 132). The testimony before a sub-committee of the Senate Committee on Commerce (62nd

parative law and practice discloses a variety of watch systems on both a two-watch and three-watch practice, but under no system is the period of watch duty limited to 4 hours and on the contrary watch periods ranging from 1 hour to 6 hours are commonplace.[5]

If the immemorial custom referred to in fact existed and is to be read into the statute, it must likewise be so read into the later statute enacting a maximum 8-hour day. This, however, is not in accordance with administrative construction. In a letter of July 14, 1939 (App. V) the Bureau of Marine Inspection and Navigation through an assistant director, in referring to the later statute, states:

> "It should be pointed out that while the watches of licensed officers must be equally divided and successive, *there is no statutory requirement which establishes that these watches must be four hours on and eight hours off.* Under the present statute, the watches may be set in any manner which the employer deems expedient, so long as they are equally divided and successive, and the licensed officers are not required to work more than *eight hours* in one day."

It is apparent that no violation of the statute by the first mate could by any possibility have caused or con-

---

Cong. 3rd Sess. 1912) on H. R. 23673, the provisions of which as S. B. 136 (63rd Cong.) became the Seamen's Act, showed a custom of standing watches of 6 hours duration on the Great Lakes (Part 2, pp. 88, 90, 94, 95, 111, 120, 125; Part 6, pp. 372, 383; Part 9, pp. 577, 583; Part 11, pp. 738, 767; Part 12, p. 801) and in off-shore operations generally (Part 6, p. 392; Part 8, pp. 526, 527, 528) and of 12 hours on smaller Atlantic coastwise vessels (Part 3, p. 144). See also Cong. Rec. Vol. 50, Part 7, p. 5674 (63rd Cong. 1st Sess., Oct. 16, 1913).

[5] *International Labor Conference, Preliminary Report,* 13th Sess., Geneva, 1929.

tributed to the stranding.[6] The Circuit Court of Appeals has, however, arbitrarily applied the watch provisions of the statute to the pilot. It would appear to be clear that the watch provisions of the statute must be applied only to the three mates. The pilot was not in fact one of the three mates, he was an additional officer not required by statute, but permitted by the DENALI's certificate and was carried as an additional navigating precaution. The only statutory requirement applicable to him was that he must not work in excess of 12 hours in any 24-hour period and this he did not do. The Circuit Court of Appeals, however, applied its construction of the watch provisions of the statute to the second mate, third mate and pilot with the result that it was held that the pilot should have been on duty but 8 hours a day, rather than 12 hours a day, and as he was on duty at the time of stranding the DENALI was then held to be in violation of the statute.[7] The erroneous construction and application of the statute has resulted in an obvious miscarriage of justice by penalizing petitioner for employing and using an experienced pilot in addition to the regular number of mates in the navigation of the DENALI, which should be corrected by this Court.

---

[6] *The North Star*, 255 F. 955 (C. C. A. 2; 1919); *The Wyomissing*, 72 F. (2d) 834, 838 (C. C. A. 3; 1934); *The Nacoochee*, 137 U. S. 330, 341 (1890); *The Blue Jacket*, 144 U. S. 371, 389 (1892).

[7] Approximately two months after the original enactment of the "three-watch" statute complaint was made of the practice of pilots on vessels of petitioner serving 12 hours a day in alleged violation of the statute. The complaint was dismissed by the Department of Commerce on the ground that there was no violation. (App. VII-XI)

EXONERATION FROM LIABILITY SHOULD HAVE BEEN GRANTED.

The Circuit Court of Appeals denied exoneration under sec. 3 of the Harter Act based first on the finding that the DENALI was navigated in violation of the statute and that such violation, without more, rendered the DENALI unseaworthy; and second, that as such violation was customary on the vessels of petitioner there was therefore lack of due diligence to make the DENALI seaworthy.

It is conceded that exoneration from liability for claims arising from the stranding may only be granted if petitioner is able to show either that the DENALI was in fact seaworthy at the commencement of the voyage, or that due diligence was exercised to make her so. It is, of course, clear that if the DENALI was in fact seaworthy at the commencement of the voyage the issue of "due diligence" becomes immaterial. *The Indien,* 71 F. (2d) 752, 756 (C. C. A. 9; 1934); *The Wildcroft,* 201 U. S. 378, 386 (1906). The test of seaworthiness "is whether the vessel is reasonably fit to carry the cargo which she has undertaken to transport." *The Sylvia,* 171 U. S. 462, 465 (1898). Perfection is not required. *Pillsbury Flour Mills Co. v. Becker S. S. Co.,* 49 F. (2d) 648, 650 (D. C. N. Y., 1931). The issue is one of fact. *M'Lanahan v. The Universal Insurance Co.,* 1 Pet. 170, 184 (1828).

The District Court found as a fact that not only had due diligence been exercised to make the DENALI seaworthy at the commencement of the voyage, but

that she was in fact seaworthy (R. 5450). The Circuit Court of Appeals has not disturbed the District Court's finding that the DENALI was in fact seaworthy, but has held as a legal conclusion that a violation of the statute, without more, rendered her unseaworthy (R. 5636). In so holding the Circuit Court of Appeals has erred and its decision is in conflict with *Hartford & New York Transp. Co. v. Rogers & Hubbard Co.*, 47 F. (2d) 189, 191 (C. C. A. 2; 1931) wherein it was contended that the vessel was unseaworthy because she carried but one able seaman, although her certificate required two able seamen. Augustus N. Hand, J., for the court, said:

> "Failure to comply with the terms of the certificate would subject those responsible for the irregularity to penalties, but would not necessarily render the vessel unseaworthy. Seaworthiness in respect to the crew of a vessel depends on whether the personnel is competent to perform maritime services and not on certificates. The personnel in the present case was satisfactory."

Despite a violation of the statute there therefore still remains the factual question as to whether or not the DENALI was seaworthy despite such violation. The Circuit Court of Appeals not having disturbed the finding of the District Court that the DENALI was in fact seaworthy at the commencement of the voyage and having erred in deciding that a violation of the statute, without more, rendered her unseaworthy, the Circuit Court of Appeals has erred in failing to affirm the decree granting exoneration.

Further, assuming that a violation of the statute, without more, rendered the DENALI unseaworthy, nevertheless petitioner is entitled to exoneration from liability if "due diligence" was exercised to make her seaworthy at the commencement of the voyage. The Circuit Court of Appeals finds a lack of such due diligence solely because of a customary violation of the statute (R. 5624, 5625). Whether such due diligence has been exercised is a question of fact "which must be proved by a showing of what was actually done to this end, and that this was all that could reasonably have been expected to have been done." *The Point Brava,* 1 F. Supp. 366, 368 (D. C. Cal., 1932).

The Circuit Court of Appeals does not find a wilful or intended violation of the statute. It can scarcely be assumed that petitioner would intentionally violate a statute which might deprive it both of exoneration and limitation, as has resulted in this case. On the contrary, petitioner for the sole purpose of greater safety of life and property employed a qualified pilot in addition to the master and three mates required by law. Petitioner finds itself charged with a violation of the statute and with lack of "due diligence" solely because it did not know during the 22 years in which the statute was in force, and particularly on the voyage of the DENALI, that the same was subject to the construction given it by the Circuit Court of Appeals.

The facts do not support a finding of lack of "due diligence" because of this failure to correctly construe the statute or to anticipate the construction placed

thereon. The Circuit Court of Appeals found that the alleged violation was a "customary violation" existing on all petitioner's vessels (R. 5625). It appears without conflict in the testimony that the method of operation of the vessels in petitioner's fleet was well-known to the Inspectors of the Bureau of Marine Inspection and Navigation.[8] No objection has ever been made by the Inspectors that the statute was being violated by petitioner, despite their intimate knowledge of its method of operation. On the contrary, they had permitted the vessels to be so operated under certificates expressly stating that the same were "in all things in conformity with the laws governing the Steamboat Inspection Service and the Rules and Regulations of the Board of Supervising Inspectors" (Pet. Ex. 8).

In order to show "due diligence" it is not necessary in addition to showing that petitioner has done all that could "reasonably have been expected to have been done" that petitioner further show that there has been no statutory violation, such is not the requirement of the statute. Nor does the fact that some statute or regulation has been violated require a holding that "due diligence" has not been exercised, to do so would be to require perfection, not that petitioner has done all that is reasonably to be expected to have been done.

If petitioner, in addition to placing reliance on its own construction of the statute, and on the acquiescence of the Bureau of Marine Inspection and Navigation and its subordinate officers therein, had likewise

[8] R. 802, 814, 815, 817, 825, 870, 876.

relied on the opinion of the District Court and the ruling of the Department of Commerce (App. VII-XI) and of the Bureau (App. V) it would nevertheless have failed in the "requisite perfection." No amount of legal acumen would have availed petitioner short of prescience, and that is something far removed from the reasonable action required for "due diligence."

The fact that this alleged customary violation of the statute existed without government interference establishes a reasonable standard of conduct[9] and if it were contended that it was not reasonable then the burden was on respondents to come forward with some testimony showing that petitioner's reliance thereon was unreasonable. The test, we again state, is not whether in fact petitioner was in violation of the statute, but whether its conduct in that regard fails to meet a reasonable standard to be applied to petitioner.

Even an attorney, whose business it is to know the law, is not held responsible "for being in error as to a question of law on which reasonable doubt may be entertained by well informed lawyers, or for error in judgment on points of new occurrence, or of nice or doubtful construction." 7 C. J. S. p. 980, §142. The undisputed facts make a *prima facie* showing of "due diligence" and as stated in *The Buckleigh,* 31 F. (2d) 241, 243 (C. C. A. 2; 1929):

> "Enough evidence was offered to place upon the libelants the duty of going forward with proof, if

[9] *Mintz v. Baldwin,* 289 U. S. 346, 351 (1933); *Norwegian Nitrogen Prod. Co. v. U. S.,* 288 U. S. 294, 315 (1933); *United States v. Chicago, N. S. & M. R. Co.,* 288 U. S. 1, 13 (1933).

they wished to avoid the exemptions of the Harter Act * * * ."

No proof was offered by respondents to meet the showing made by petitioner. The decision erroneously restricts the operation of sec. 3 of the Harter Act and should be corrected by this Court.

LIMITATION OF LIABILITY SHOULD HAVE BEEN GRANTED.

On the assumption that there was in fact a violation of the statute in the watch in which the DENALI stranded, the final questions presented are whether the Circuit Court of Appeals erred in finding privity and knowledge of such violation and if not, whether the majority of the Circuit Court of Appeals erred in its application of the Pennsylvania rule to the issues presented. If the rule is not applicable, then limitation of liability must be granted.

PETITIONER WAS WITHOUT PRIVITY OR KNOWLEDGE OF THE ALLEGED VIOLATION OF THE STATUTE.

The Circuit Court of Appeals has found privity and knowledge on the part of petitioner of the violation of the statute "because it was by its regulation and established practice that the navigating mate [pilot] in the maneuvers leading to the strand commanded the vessel while he was and had been violating the three watch requirement of the statute by standing 12 hours per day in navigating during the entire voyage" (R. 5634).

The Circuit Court of Appeals thus apparently refers to its previous holding that the first mate stood no regular watch and that this was the custom on the vessels of petitioner in the Alaska trade (R. 5615) and to General Order No. 13 directed to all masters and pilots instructing them to "never leave the ship in charge of second or third officers when approaching land and changing course" (R. 5617, 5618). Reference has been made to the watches actually stood by the first mate. General Order No. 13 is obviously an instruction that either the master or pilot must be on duty in the pilot house when their superior local knowledge is most needed for the safety of the vessel.

The Circuit Court of Appeals has not found that there was any bad faith or wilfulness on the part of petitioner. The most that can be said is that it was customary for petitioner to operate its vessels in the manner in which the DENALI was operated. It now appears for the first time that this customary practice was violative of the statute as construed by the Circuit Court of Appeals. It is submitted that this is not such privity or knowledge as to debar petitioner from the right to limitation of liability.

The statutes granting to shipowners limitation of liability are designed to promote and encourage shipping and are to be administered in the shipowners' favor and not with a tight and grudging hand. In *Moore v. American Transp. Co.*, 24 How. 1, 39 (1860), it is said:

> "The act was designed to promote the building of ships, and to encourage persons engaged in the

business of navigation, and to place that of this country upon a footing with England and on the continent of Europe."

In *Providence & New York S. S. Co. v. Hill Mfg. Co.*, 109 U. S. 578, 588, 589 (1883), it is said:

> "In these provisions of the statute we have sketched in outline a scheme of laws and regulations for the benefit of the shipping interest, the value and importance of which to our maritime commerce can hardly be estimated. Nevertheless, the practical value of the law will largely depend on the manner in which it is *administered*. If the courts having the execution of it *administer* it in a spirit of fairness, with the view of giving to ship owners the full benefit of the immunities intended to be secured by it, the encouragement it will afford to commercial operations (as before stated), will be of the last importance; but if it is administered with a tight and grudging hand, construing every clause most unfavorably against the ship owner, and allowing as little as possible to operate in his favor, the law will hardly be worth the trouble of its enactment. * * * ."

In *Capitol Trans. Co. v. Cambria Steel Co.*, 249 U. S. 334, 336 (1919), it is said:

> "We very much appreciate the danger that the act should be cut down from its intended effect by too easy a finding of privity or knowledge on the part of owners, as also by too liberal an attribution to them of contracts as personally theirs. We are not disposed to press the law in those directions further than the cases go."

Petitioner here at most was in error as to the legal interpretation of the statute as applied to the navigation of the DENALI. Even as to an attorney, skilled in the law, this would at most amount to mere negli-

gence. It is well settled "that mere negligence, pure and simple, in and of itself does not necessarily establish the existence on the part of the owner of privity and knowledge within the meaning of the statute." *LaBourgogne,* 210 U. S. 95, 122 (1908).

This rule was applied in *Kitsap County Transp. Co. v. Harvey,* 15 F. (2d) 166, 168 (C. C. A. 9; 1926), where a shipowner was held liable for injuries sustained by a passenger due to negligent original construction of the vessel, but was nevertheless held to be entitled to limitation. The owner knew of the construction of the vessel, which was found to be improper. The court after first adverting to the liberal construction to be given the limitation statute and that "privity or knowledge" means something more than mere negligence, said:

> " * * * there is no evidence of *bad faith or wilfulness.* The design of the vessel is not without the approval of some competent authority, and upon the whole the question of negligence is a debatable one. Accordingly we hold it a proper case for the limitation of liability."

So here there is no evidence of bad faith or wilfulness. The practice was found to be customary and had received the approval, implied if not expressed, of the Inspectors and of the Department of Commerce. The construction of the statute required to effect a violation is at least debatable and therefore this likewise is a proper case for limitation of liability.

The decision of the Circuit Court of Appeals is in conflict with *The Virginia,* 264 F. 986, 996, 997 (D. C.

Md., 1920), aff'd. in *Hines v. Butler,* 278 F. 877 (C. C. A. 4; 1921) and *LaBourgogne,* 210 U. S. 95 (1908). In the former case there was a negligent failure to obey the inspection laws and regulations, which negligence "was due in part at least to the personal negligence of the petitioner" and had been long continued and "but for such negligence, the fire might have been extinguished before the cargo was destroyed." The court nevertheless granted limitation as to cargo claims, holding that the negligence did not amount to "privity or knowledge." After referring in part to the above quoted language from *LaBourgogne,* 210 U. S. 95, 122 (1908), the District Court said:

> " * * * there must be something more than mere *thoughtlessness or casual oversight.* * * * . Perhaps the owner cannot deny privity or knowledge if * * * he fell short of what a fair-minded, well-informed, and impartial man would feel was his moral duty in the premises."

Can it be said that petitioner here was guilty of even thoughtlessness or casual oversight? We think not. On the contrary petitioner considered that the addition of a pilot, as had been customary for years, was an added precaution. Petitioner erred not in attempting to underman the vessel, but in an alleged erroneous overmanning.

THE MAJORITY HAS MISCONSTRUED AND MISAPPLIED THE PENNSYLVANIA RULE.

The majority of the Circuit Court of Appeals has held that there was a violation of the "three-watch"

statute, of which petitioner had privity and knowledge and although it appears from the evidence that such violation *did not* cause or contribute to the stranding, has nevertheless held that limitation must be denied because of petitioner's failure to meet the "extraordinary burden" of showing that the violation *could not,* as distinguished from *did not,* contribute to the stranding (R. 5618, 5619). This result is said to follow from *The Pennsylvania,* 19 Wall. 125 (1873), and *Lie v. San Francisco & Portland S. S. Co.,* 243 U. S. 291 (1917). Therein lies the division between the majority and dissenting opinions. Mathews, J., dissenting, held that petitioner had only the "ordinary burden" of proving that the stranding occurred without its privity or knowledge, not the "extraordinary burden" imposed in the cited cases—both collision cases—the doctrine of which he held inapplicable. He further held that the evidence amply supports the District Court's finding that the sole cause of the stranding was due to faults or errors in her navigation of which petitioner was without privity or knowledge (R. 5629).

Rehearing was granted on the question of whether the Pennsylvania rule should be applied (R. 5636) resulting in the same division of opinion (R. 5632).

Petitioner asserts: First, that the Pennsylvania rule is a procedural rule applicable only on the question of liability in a collision case. It transfers the burden of persuasion on the issue of causation to the vessel violating a statutory rule to prevent collisions by requiring the offending vessel to prove that the violation

was not a contributory cause. This burden of persuasion is but the ordinary burden and is not an "extraordinary burden" requiring proof that the violation *could not,* in the sense of could not by possibility, have been a contributory cause. Second, that the rule may not be applied in a limitation case to add to the burden of the petitioner to show that it was without privity or knowledge of the cause of the loss. This burden is but the ordinary burden and the rule may not be used as a presumption and as such be given weight as evidence.

First: The Pennsylvania rule is taken from *The Pennsylvania,* 19 Wall. 125 (1873) where a collision occurred in a fog on the high seas between a British bark and a British steamer. Both by British and American statute a fog horn was to be blown by the bark while under way and a bell was to be sounded when not under way. The bark was under way and sounded a bell. Both vessels were found at fault and in referring to the bark this Court said:

> " * * * when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been." (p. 136.)

After referring to the speculative nature of the testimony as to whether the failure of the bark to blow a

fog horn contributed to the collision, it is stated:

> " * * * while the presumption is that the failure to blow a fog horn was a contributory cause of the collision, and while the burden of showing that it was in no degree occasioned by that failure rests upon the bark, it is impossible to rebut the presumption. * * * . Hence, it appears to us the bark has not proved that her failure to obey the shipping regulations *was not* a concurrent cause of the injury she received * * * ." (pp. 137, 138.)

At the time of this decision the English law on collisions which this Court purported to adopt, was announced in *The Fenham,* 23 L. T. 329 (1870) quoted in the decision (p. 136) as follows:

> " * * * if it is proved that any vessel has not shown lights, the burden lies on her to show that her non-compliance with the regulations *was not* the cause of the collision."

In *The Pennsylvania,* 23 L. T. 55 (1870), being a decision involving the same collision, the bark was exonerated from liability on the finding "that the collision *was not* occasioned by the absence of blowing the fog-horn." It is apparent that this Court did not intend to announce a different rule or change the rule which it had previously announced in such cases, and the difference in result was said to be due to the fact that "the case was heard there on evidence much less full than that upon which it was heard in New York, especially less full on the part of the steamer" (p. 129). In referring to the different result reached, this Court in *The Martello,* 153 U. S. 64, 74 (1894), said: " * * * both courts proceeded upon the same legal principle * * * ."

It is to be noted, however, that the rule is stated by this Court as requiring a "showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been." However, in *Richelieu Nav. Co. v. Boston Ins. Co.,* 136 U. S. 408, 422 (1890) this language is said to be "but the statement of the settled rule in collision cases." The settled rule in collision cases where a statutory violation existed was previously announced by this Court in *Waring v. Clarke,* 5 How. 441, 465 (1846) as follows:

> " * * * if such neglect or disobedience of the law shall be proved to exist when injury shall occur to persons or property, it would throw upon the master and owner of a steamboat by whom the law had been disregarded the burden of proof, to show that the injury done *was not* the consequence of it."

Shortly thereafter in *The City of Washington,* 2 Otto 31, 36 (1875) the rule was similarly announced as follows:

> " * * * such an omission of duty casts upon the schooner the burden of proving that the omission in that regard *did not* occasion or contribute to the collision."

In *Prince v. Eastern S. S. Co.,* 109 Me. 395, 84 Atl. 894, 896 (1912) which contains a most precise discussion of the rule, the court in referring to the burden of proof imposed on the offending vessel, states:

> "*The Pennsylvania* obviously adopts the English rule laid down in *The Fenham,* Law Reports, 3 Privy Council Appeals 212. But the English rule does not refer, either directly or by inference,

to the 'could not' doctrine, as claimed by the defendant. It is stated in this direct language: 'The burden lies upon her to show that her non-compliance with the regulations was not the cause of the collision.' Following this rule, *The Pennsylvania* case nowhere declares that it must show that the ship's fault did not contribute, and then further, as a matter of independent proof, that it could not have contributed. The reasoning of the court negatives any such conclusion. Having by the process of elimination declared that it was not enough to show, 'not merely that her fault might not have been one of the causes, or that it probably was not,' and, the ship having failed to establish that her fault did not contribute, the court required her to prove that her fault 'could not have contributed' and, *arguendo,* did not. *The Pennsylvania,* having adopted the rule of proof laid down in *The Fenham,* undoubtedly intended to declare that the 'could not' rule in the one case, and the 'did not' rule in the other, were identical in meaning, and that proof of 'could not' was equivalent to proof of 'did not.' "

The English rule which this Court adopted was subsequently changed by statute, sec. 17 of the Merchant Marine Shipping Act, 1873, 36 & 37 Vict. c. 85, subsequently reenacted by sec. 419(4) of the Merchant Shipping Act, 1894, which latter statute provides:

> "Where, in a case of collision, it is proved to the Court before which the case is tried that any of the collision regulations have been infringed, the ship by which the regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the Court that the circumstances of the case made departure from the regulation necessary."

As stated by *Marsden's Collisions at Sea* (9th ed., 1934), pp. 55, 56 one of the objects of this legislation

was "to enable the courts to adjudicate upon collision cases without the necessity of determining upon conflicting evidence the question of fact, (often a nice one), whether or no an infringement of a regulation, applicable to the case, and that might by possibility have contributed to the collision, did, in fact, contribute to the collision * * * . The statute imposed on a vessel that has infringed a regulation which is *prima facie* applicable to the case, the burden of showing affirmatively that such infringement could not, by possibility, have contributed to the collision. The Court had to inquire into the facts, in order to ascertain whether the infringement could possibly have contributed to the collision, for it was not sufficient to find that it did not contribute."

In *The Martello,* 153 U. S. 64 (1894) it is stated, without apparently recognizing the change which had been effected by statute in England, that the rule as announced in *The Fanny M. Carvill,* 13 App. Cas. 455 n. (1875); *The Duke of Buccleuch,* 15 P. D. 86; S. C. 1 App. Cas. (1891) 310; *The Love Bird,* 6 P. D. 80 (1881), was to the same effect as the Pennsylvania rule. These English cases, however, were announcing the rule in England as changed by statute, as witness the quotation in the opinion (p. 74) from *The Fanny M. Carvill*:

> " * * * if you can show that there is a defect in the lights, that vessel must be held to blame unless she can show that the defect which existed in her lights could not by any possibility have contributed to the collision."

It is not believed that this error effected the decision as it appears that the vessel which was in violation of the statute did not in fact prove that the violation *did not* contribute to the collision. This error has subsequently been reflected in the language of some of the lower court decisions, but in the following cases the correct burden of the rule is announced: *Dougherty v. Steamer Franconia,* 3 F. 397, 403 (D. C. N. Y.; 1880); *The Providence,* 282 F. 658, 664, 665 (D. C. R. I,. 1922); *The Mabel,* 35 F. (2d) 731, 732 (C. C. A. 2; 1929); *The Domira,* 49 F. (2d) 324, 327 (D. C. N. Y., 1931).

By the Maritime Conventions Act, 1911 (1 & 2 Geo. 5, c. 57, secs. 4(1), 9(2)), sec. 419(4) of the Merchant Shipping Act, 1894, was repealed. As stated by *Marsden's Collisions at Sea,* (9th ed., 1934) p. 65:

> "The effect of the Act is to abolish an arbitrary rule by which any infringement, which by possibility might have contributed to the collision, rendered a vessel to blame and to 'leave the Court to follow what is a reasoning judgment and to say, "Did this want of obeying the regulations in any way contribute to the collision?" not "Might it possibly have done so?" ' It has thus now again become necessary to prove that non-observance of a regulation was the cause, or part of the cause, of a collision or of the damage resulting from the collision, as it always had been before 1873."

Thus the history of the English rule—limited, it may be observed, to maritime collisions—shows that the so-called "arbitrary" rule was purely a creature of English statute, enacted to alter the rule in *The Fenham* and later repealed because of its unfairness.

The Pennsylvania having been decided prior to the enactment of the English statute, had merely adopted the rule previously announced by this Court and recognized by the English courts prior to 1873.

In admiralty[10] as at common law,[11] liability for negligence or unseaworthiness arises as a general rule only when a complaining party is able to sustain the burden of proving that the offending party has violated some duty, whether statutory or non-statutory, owed to him and that such violation has actually caused a loss. The Pennsylvania rule is clearly an exception even in admiralty and is to be applied only in collision cases. There must be some reason beyond the general policy of enforcing all statutory codes of conduct, before the rule should be extended to other than collision cases, as otherwise it would be the general rule both in admiralty and at common law. Inasmuch as most collisions result from a misunderstanding by one or both vessels as to the intended movements of the other, uniform rules, now statutory but formerly non-statutory, have been promulgated for the sole purpose of reducing such confusion to a minimum. Where, therefore, a collision results and a vessel is shown to have violated such rules it is thought fair and reasonable

---

[10] *Cleary Bros. v. Port Reading R. Co.*, 29 F. (2d) 495, 498 (C. C. A. 2; 1928); *Republic of France v. French Overseas Corp.*, 277 U. S. 323, 334 (1928); *The Baymead*, 88 F. (2d) 144, 147 (C. C. A. 9; 1937); *The Europa*, 11 Asp. M. C. (N. S.) 19, 20 (1907); *Flanders, The Law of Shipping*, (1853) pp. 199, 288, 289; *Carver, Carriage of Goods by Sea* (8th ed., 1928) p. 21.

[11] *Shearman & Redfield Law of Negligence* (6th ed., 1913) §37; 2 Restatement of Law on Torts, §286; 20 R. C. L. 43, §37; 45 C. J. 901, §478; 45 C. J. 902, §479; 45 C. J. 1170, §752.

that the burden should be on the offending vessel to prove that her violation was not the very thing that caused the confusion and the resulting collision.[12]

That the rule presuming causation is limited to collision cases and that its application is not dependent upon the statutory nature of the violation, is further brought out in *Parsons on Maritime Law* (1859), Vol. I, p. 191, where it is stated: "Generally, if a collision has happened, and one vessel had been guilty of some negligence, the burden is on her to prove that this negligence was not the cause of the collision * * * ." It is to be noted that this early announcement of the rule subsequently stated in *The Pennsylvania* was prior to the original statutory enactment of the general rules for navigation.[13] Prior to the statutory enactment the burden was upon the libelant to establish the respondents' negligent conduct as in all other cases, by proving non-compliance with the customary collision rules generally followed by mariners. Negligence being established the rule later to be known as the Pennsylvania rule shifted the burden of persuasion on the issue of causation. The statutory enactment of the rules merely afforded a libelant the supplementary procedural advantage of a presumption of negligence arising from the statutory violation. This dual pro-

---

[12] *Marsden's Collisions at Sea* (9th ed., 1934) pp. 7, 8; *LaBoyteaux, Rules of the Road at Sea,* (1920) pp. 1, 2, 6; *St. John v. Paine,* 10 How. 557, 583, 584 (1850); *New York & Liverpool U. S. Mail S. S. Co. v. Rumball,* 21 How. 372, 383, 384 (1858); *Clapp v. Young,* Fed. Cas. No. 2786 (D. C. Mass., 1843); *The Emily,* Fed. Cas. No. 4453 (D. C.) N. Y., 1845).

[13] R. S. §4233, Act of Apr. 29, 1864, c. 69, 13 Stat. 58.

cedural advantage was present in *The Pennsylvania. Parsons on Maritime Law* (1859) Vol. I, p. 193 n. in referring to early statutory enactments relative to lights, points out the additional procedural advantage, stating:

> "If a vessel disregard the provisions of these statutes, the burden is on her to show, in case of a collision, that the accident was not owing to such neglect."

The presumption of negligence and the shifting of the burden of persuasion on the issue of causation are in effect applied as one in collision cases involving violations of statutes. This is not true, however, of violations of statutes in cases other than collisions. In *St. Louis, I. M. & S. R. Co. v. McWhirter,* 229 U. S. 265, 281, 282 (1913), a brakeman was killed in an accident occurring after he had been on duty for more than sixteen hours in violation of the Hours of Service Act. The question in the case was stated as follows:

> " * * * whether there was any evidence tending to show a connection between the asserted negligence and the occurrence of the accident; that is, whether the plaintiff had offered any proof tending to show the existence of the Federal right which was asserted; * * *."

In holding that the judgment below in favor of the plaintiff must be reversed, it was said:

> " * * * we are clearly of the opinion that, as there was no proof tending to show a connection between the permitting of the working beyond the statutory time, and the happening of the accident, reversible error was committed. Of course the inquiry whether there was any proof having such tendency is not to be solved by indulging in mere

surmise or conjecture, or by resorting to imaginary possibilities, for to so do would but resolve the question back to the generic rule of liability as insurer which we have previously disposed of."

The Pennsylvania rule has heretofore been applied by this Court only in collision cases on the question of liability.[14] The majority of the Circuit Court of Appeals relies principally on *Richelieu Nav. Co. v. Boston Ins. Co.*, 136 U. S. 408, 423, 424 (1890) for the propriety of extension of the rule to non-collision cases and different issues. That case was an action on an insurance policy for damages to a Canadian vessel resulting from a stranding in Canadian waters. The policy excluded losses consequent upon want of ordinary care and skill in navigating the vessel and on unseaworthiness. At the time of the stranding the vessel was being navigated at full speed in a dense fog in violation of a Canadian statute which provided that any damage to a vessel arising from non-observance of the statute shall be deemed to have been occasioned by wilful default unless the contrary be proved. It was further charged that the vessel's compass was defective. This Court approved instructions to the jury placing the burden on the vessel owner to show affirmatively that neither the speed of the steamer nor the defects of the compass could have caused or have contributed to cause the stranding, in order to recover on the policy. This Court, referring to the Pennsylvania

[14] *Belden v. Chase*, 150 U. S. 674, 699 (1893); *The Martello*, 153 U. S. 64, 74 (1894); *Lie v. San Francisco & P. S. Co.*, 243 U. S. 291, 298 (1917).

rule, stated: " * * * and this was but the statement of the settled rule in collision cases." It was further stated:

> "In this case, in view of the * * * Canadian statute, and the fact that perils occasioned by the want of ordinary care and skill or of unseaworthiness were excepted by the policy, the same rule is applicable; hence, the burden was on the plaintiff to show that neither the speed of the steamer nor the defect of the compass could have caused, or contributed to the stranding. * * * .
>
> "* * * .
>
> " * * * *. It was necessary to the plaintiff's case that it should appear from the whole proof that the loss *was not* occasioned by the want of ordinary care by the master or on account of unseaworthiness and was not within the exceptions contained in the policy, against which plaintiff was not insured."

It is believed that this case is restricted to the factual and legal issues presented and that it is not to be taken as an extension or application of the Pennsylvania rule to stranding cases generally.[15]

---

[15] The following cases referring to *Richelieu Nav. Co. v. Boston Ins. Co.*, 136 U. S. 408, 423 (1890) are likewise relied upon by the majority of the Circuit Court of Appeals: In *Flint & P. M. R. Co. v. Marine Ins. Co.*, 71 F. 210, 216 (C. C. Mich., 1895) a similar factual and legal situation was presented but it was unnecessary to apply the burden of proof announced by this Court as the evidence "establishes uncontestably the relation of cause and effect between the speed and the stranding of the steamer." In *Amer. Mcht. Marine Ins. Co. v. Liberty S. & G. Co.*, 282 F. 514 (C. C. A. 3; 1922), being an action on an insurance policy it was held that the defendant having alleged a breach of warranty of unseaworthiness had the burden of proof on that issue. The court merely refers to *The Pennsylvania* rule and its alleged application. In the *Material Service*, 1937 A. M. C. 925 (D. C. Wis., 1937), affirmed *Leathem Smith-Putnam Nav. Co. v. National U. F. Ins. Co.*, 96 F. (2d) 923, 928 (1938), being an action on an insurance policy, the lower court referred to the rule announced and required the plaintiff to show lack

The last decision of this Court referring to the Pennsylvania rule is *White Oak Transp. Co. v. Boston, Cape Cod & N. Y. C. Co.*, 258 U. S. 341, 344 (1922). The steamer BAY PORT grounded in the Cape Cod Canal after passing over two shoals where there was less than 25 feet of water. In cross actions for damages it was held that both the owner of the vessel and the Canal Co. ought to have known that it was unsafe to take the vessel through the canal and both were held at fault and their damages divided. The Canal Co.'s charter required the canal to be 25 feet deep throughout. It was urged that the shoals referred to caused the trouble and it was argued on behalf of the vessel owner that the Canal Co. had not sustained the burden of proving that the strandings could not have been caused by the shoal spots and on behalf of the Canal Co. that the Circuit Court of Appeals was right in not holding as a matter of law that the Canal Co. to avoid liability must prove that said shoal spots not only did not cause, but could not have caused the two strandings, or either of them. This Court said:

> "* * * but, notwithstanding *The Pennsylvania*, 19 Wall. 125, 22 L. ed. 148, we will accept the finding of the two courts that they *were not* the proximate cause."

We take this to be the ruling that this Court agreed with the contention of the Canal Co. that either the Pennsylvania rule was not applicable, or if applicable,

---

of causation between an unseaworthy condition and the sinking of the vessel, but on appeal it was held unnecessary to deal with this procedural question as the evidence disclosed a loss falling within the exceptions of the policy.

that the burden of persuasion under the rule is met by showing that the violation *did not,* as distinguished from *could not,* have contributed to the strandings.

As further authority for the extension of the Pennsylvania rule to non-collision cases the majority of the Circuit Court of Appeals relies on the following cases: In *The M. M. Chase,* 37 F. 708, 713 (D. C. N. Y., 1889) apparently affirmed on appeal, *The Coventina,* 52 F. 156, 158 (D. C. N. Y., 1892), a vessel was held liable for damages to a consignee having a lien on cargo for failure to give appropriate notice of an attachment and it was held that the consignee was not required to show that if such notice had been given the cargo would have been saved, but that the burden was on the vessel to prove the contrary, citing *The Pennsylvania.* This decision, it is submitted, is anomalous insofar as it purports to apply a collision rule in an entirely different field and on an entirely different issue. In *People's Coal Co. v. Second Pool Coal Co.,* 181 F. 609 (D. C. Pa., 1910) there was a collision between a vessel and a sunken wreck which had not been properly marked as required by statute and in *Dorrington v. City of Detroit,* 223 F. 232 (C. C. A. 6; 1915) there was a collision between a schooner being towed by a tug and a drawbridge which had not been opened promptly as required by statute. The Pennsylvania rule was applied in these cases but it is not believed that they are authority for the application of the rule in non-collision cases as the peculiar reasons underlying the rule may as well be applied to these

types of collisions as any other. In *The Carbonero,* 106 F. 329, 335 (C. C. A. 1; 1901), although the court indicated that if there had been a statutory fault in connection with the misconduct of a tug which lost her barges, the Pennsylvania rule would have been applied, the rule was not applied. In *Central Vermont Ry. Co. v. Bethune,* 206 F. 868, 876 (C. C. A. 1; 1913) the court does no more than refer to the Pennsylvania rule as a rule applied in "collision cases." In *The Princess Sophia,* 61 F. (2d) 339, 347 (C. C. A. 9; 1932) the court referred to the Pennsylvania rule in a stranding case, but as no statutory violation was found, did not apply the same.

Second: This is not a collision case and the question of liability as such is not at issue. Liability, *prima facie,* has been established by petitioner's failure to deliver the cargo. Respondents are therefore not entitled to and do not require the procedural advantage of the Pennsylvania rule for the purpose of establishing liability.

Petitioner here seeks to obtain limitation of its liability under the statute (App. III) granting to shipowners such protection. Such limitation is to be granted under the statute if it appears that petitioner was without privity or knowledge of the cause of the stranding.[16] It is not sufficient that it appear that

---

[16] *Lord v. Goodall,* 15 Fed. Cas. 884, 887 (C. C. Cal., 1877); *The Colima,* 82 F. 665 (D. C. N. Y., 1897); *The Rose Standish,* 26 F. (2d) 480 (D. C. Mass., 1928); *The Commonwealth,* 31 F. (2d) 142 (D. C. Mass., 1929); *The Calvert,* 37 F. (2d) 355, 358 (D. C. Md., 1929); *The 84-H,* 296 F. 427 (C. C. A. 2; 1923); *Benedict on Admiralty,* (5th ed., 1925) pp. 594, 596.

there was a failure in equipment, inspection or personnel. As stated in *The El Sol,* 45 F. (2d) 852, 855 (D. C. N. Y., 1930):

> "It must be shown that the fault in equipment, inspection or personnel actually contributed to the accident in respect to which the shipowner seeks limitation.
>
> "This is a practical world and an omission to which a shipowner is privy, but which has not any causal connection with the damage for which claim is made, is venial in the eyes of the law."

On the appeal, *Southern Pac. Co. v. United States,* 72 F. (2d) 212, 215 (C. C. A. 2; 1934) in which the District Court was affirmed, Learned Hand, J., states:

> "The petitioner need show no more than that he was not privy to the wrong which the claimant has proved.'"[17]

Respondents made no attempt to prove, nor did the Circuit Court of Appeals find that the violation of the statute caused or contributed to the stranding. The majority of the Circuit Court of Appeals has held that although the independent fact of faulty navigation by the pilot has been found by the ordinary burden of proof to have been the cause of the stranding, nevertheless limitation must be denied because of the failure of petitioner to prove that the violation of the statute could not in the sense of could not by possibility have contributed. This is both a misapplication and a misinterpretation of the Pennsylvania rule. A mis-

---

[17] *In re Rapid Transit Ferry Co.,* 124 F. 786 (D. C. N. Y., 1903); *The Suduffco,* 33 F. (2d) 775, 776 (D. C. N. Y., 1929); *The Doris Kellogg,* 18 F. Supp. 159, 164 (D. C. N. Y., 1937), aff'd. 94 F. (2d) 1015 (C. C. A. 2; 1938).

application because it is not being applied in a collision case on the question of liability, and a misinterpretation of the *quantum* of proof required under the rule.

This application of the rule is in effect the creation of a presumption and giving to the presumption weight as evidence. In *New York Life Ins. Co. v. Gamer,* 303 U. S. 161, 171 (1938) in an action on a life insurance policy double indemnity was payable on death by accidental means. After stating that the presumption arising from a violent death required an inference of death by accident, it is stated:

> "The evidence being sufficient to sustain a finding that the death was not due to accident, there was no foundation of fact for the application of the presumption * * * . The presumption is not evidence and may not be given weight as evidence."

A legal presumption does not supply proof of a substantive fact. *United States v. Ross,* 92 U. S. 281, 283 (1875). Presumptions are never allowed against ascertained and established facts, when these appear, presumptions disappear. *Lincoln v. French,* 105 U. S. 614, 617 (1881); *Del Vecchio v. Bowers,* 296 U. S. 280, 286 (1935). So here, when it has been found from the evidence that the faulty navigation by the pilot was the cause of the stranding, there is no foundation for the application of a presumption or inference that the violation of the statute caused or contributed to the stranding.

The result of the application of the Pennsylvania rule to add to the burden of petitioner to show that it was without privity or knowledge of the cause of the loss is a judicial amendment of the limitation statute, and is not the liberal administration thereof enjoined by this Court. The statute requires no such burden and should be administered as written. *Earle & Stoddard v. Ellerman's Wilson Line,* 287 U. S. 420, 425 (1932). The effect of this decision is of the utmost importance requiring as it does that a petitioner for limitation of liability must, in addition to proving that it was without privity or knowledge of the actual cause of the loss, also prove that any statutory violation, of which it may have had privity or knowledge, could not have caused or contributed to the loss.

This additional burden has never been sanctioned by this Court. In *Southern Pac. Co. v. United States,* 72 F. (2d) 212, 215 (C. C. A. 2; 1934), a collision case the imposition of such additional burden was questioned, but "assuming * * * *arguendo*" its application it was found, as here, that the violation did not contribute to the collision and limitation of liability was granted. In *New York Marine No. 10,* 109 F. (2d) 56 (C. C. A. 2; 1940), a tug of that name was held solely at fault for a collision. The tug was short-handed with the knowledge of the owner and limitation of liability was denied because the owner failed to show that the deficiency in crew "was not" a contributory cause of the collision. This being a collision case the Pennsylvania rule was properly applicable on the question of

liability and the *quantum* of proof was correctly stated, but the extension of the rule to the issues on limitation of liability, as in the case at bar, is entirely without precedent and none of the cases cited in the decision support the novel application of the rule.

Such application of the Pennsylvania rule to the issues on limitation of liability will, of necessity, destroy the uniform administration of the limitation statute to domestic and foreign vessels alike. There are many statutes and regulations prescribing the details of manning, hours and working conditions as well as physical condition of vessels, which pertain only to the internal affairs of vessels, many of which are not in effect in other countries. The admiralty law as administered in our courts should, so far as possible, be uniform as to all vessels, both domestic and foreign, as respects their liability and the limitation thereof under the limitation statute. *The Scotland,* 105 U. S. 24, 33 (1881). If the DENALI instead of stranding had collided with a Canadian vessel (whose watch system was identical but not in violation of any applicable Canadian law), and if both vessels sought limitation of liability, the application of the Pennsylvania rule, as announced by the majority of the Circuit Court of Appeals, would result in denying limitation to the DENALI and granting limitation to the Canadian vessel. This is a result certainly never intended by this Court in announcing the Pennsylvania rule. On the other hand, as practically every maritime nation has adopted the International Rules of Navigation,

if the collision resulted from a violation of such collision rules, the Pennsylvania rule would be properly applicable on the issue of liability. It seems clear that the Pennsylvania rule was never intended to be applied except where a collision has resulted from a violation of those rules and regulations adopted for the sole and express purpose of preventing collisions and that it should never be applied in the case of violation of statutes or regulations relating solely to the internal management of a vessel.

It is respectfully urged that the questions presented involving the true meaning and proper application of the Pennsylvania rule are of such outstanding importance that this Court should assume jurisdiction.

Wherefore, it is respectfully prayed that the petition for writ of certiorari be granted.

Respectfully submitted,

LAWRENCE BOGLE,
CASSIUS E. GATES,
EDWARD G. DOBRIN,

Counsel for Petitioner.

SEP 30 1940
CHARLES ELMORE CROPLEY
CLERK

No. 395

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

ALASKA STEAMSHIP COMPANY, a corporation, Owner of the American Steamship "DENALI",
Petitioner,

—against—

PACIFIC COAST COAL COMPANY, a corporation, *et al.*, and UNITED STATES OF AMERICA,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

T. CATESBY JONES,
JAMES W. RYAN,
LANE SUMMERS,
Counsel for Respondents,
Pacific Coast Coal Company, et al.

Office and Post Office Address:
Central Building,
Seattle, Washington.

INDEX.

PAGE

Statement 1

In presenting its petition for certiorari, petitioner makes at least four assertions of fact which are in square conflict with the findings of the Circuit Court of Appeals. The Circuit Court of Appeals found that the petitioner's vessel, which failed to carry respondents' cargo to destination, was not manned as required by a safety statute of the United States, in that her mates did not stand in three watches, and that a watch and watch system, or a two-watch system, was maintained on the "Denali", which required watch officers to stand alternating watches six hours on and six hours off 4

The safety statute violated by petitioner (46 U. S. C. §223) required that a vessel of the character of the petitioner's S. S. "Denali" should have a minimum complement of three mates who were required to stand in three watches, *i. e.*, four hours on the bridge for each watch—that is eight hours out of every twenty-four 8

Nautical Meaning of the Word "Watch" 11

Four questions are presented to this Court by the petitioner. None of those questions are of sufficient importance to warrant a review by this Court 12

Question No. 1 deals largely with two questions of fact: (1) That the pilot was not acting as a substitute for the first mate, whereas both courts below found that he was so acting, and (2) that the third mate stood watch for eight hours only, whereas the Circuit Court of Appeals held that

PAGE

he did in fact stand watch for more than eight hours. In this question petitioner also criticises the Circuit Court of Appeals for interpreting the three-watch provision as limiting the watch period to four hours. This criticism is without substance. In so interpreting the statute the Court gave the statute the precise meaning as that given it by the Department of Commerce at the time when the three-watch provision was first placed in the statute, viz., R. S. §4463, as amended by the Act of March 3, 1913 12

Question 2: Petitioner's Question 2 ignores the Congressional mandate prescribing a minimum scale for safe navigation of steam vessels. The Circuit Court of Appeals correctly decided that when a shipowner habitually permits his vessels to be navigated with a two-watch system when Congress by statute had required a three-watch system for safe navigation, such failure to comply with the Congressional mandate constituted want of due diligence to make its vessel seaworthy. There is not any conflict of authority on this point 14

Question 3: An habitual, or customary, failure to comply with a statute designed to promote safe navigation known to a shipowner, constitutes privity and knowledge. The only real question is one of fact, viz., did the petitioner habitually and customarily fail to comply with a statute designed to promote safe navigation? The Court found as a fact that the petitioner did habitually fail to comply with that statute, and was in privity in and had knowledge of the mate's navigation of the ship in violation of the safety act at the moment of her running at full speed on the charted reef. There is no conflict of authority on this point 17

PAGE

Question 4: A. The rule in *The Pennsylvania* (*The Pennsylvania*, 19 Wall. (86 U. S.) 125, 136) is not confined to collision cases. There are many cases which apply the rule to other than collision cases. Principle does not require that the rule be so confined. B. Nor is the rule in *The Pennsylvania* confined to questions of liability. When, as in the present case, the only excuse which a shipowner has for failing to deliver cargo is negligence of the ship's officers, and the shipowner is unable to show that such negligence was not the result of the shipowner's failure to conform to a statute of the United States designed to keep watch officers alert, then it cannot be said that the loss was occasioned without the personal fault or neglect of the shipowner. There is no conflict of authority on either of these points 21

The Decision Below Was Eminently Just 30

The Prayer of the Petition Should be Denied 31

TABLE OF CASES CITED:

	PAGE
American Car & F. Co. v. *Brassert*, 289 U. S. 261	29
Belden v. *Chase*, 150 U. S. 674	23
Bullock v. *The Lamar*, Fed. Cas. No. 2129	23
Capital Transportation Co. v. *Cambria Steel Co.*, 249 U. S. 334	28
M. M. Chase, The, 37 F. 708	21
Cullen Fuel Co. v. *W. E. Hedger, Inc.*, 290 U. S. 82	29
Dorrington v. *City of Detroit*, 223 F. 232	22
Earle & Stoddart v. *Ellerman's Wilson Line*, 287 U. S. 420	26
Edwin J. Morrison, The, 153 U. S. 199	25
El Sol, 45 F. (2d) 852	25, 26
Flint & P. M. R. Co. v. *Marine Insurance Co.*, 71 Fed. 210	22
Hines v. *Butler*, 278 F. 877	18
Hartford & New York Transp. Co. v. *Rogers & Hubbard Co.*, 47 F. (2d) 189	15, 16
La Bourgogne, 210 U. S. 95	18, 20
Lady Pike, The, 21 Wall. (88 U. S.) 1	15
Lehigh & Wilkes-Barre Coal Co. v. *Globe & Rutgers Fire Insurance Co.*, 6 F. (2d) 736	24
Lennard's Carrying Company v. *Asiatic Petroleum Company, Ltd.* (1915), A. C. 705	26
Liverpool, Brazil & River Plate S. N. Co., In re (C. C. A. 2), 57 F. (2d) 176	25
Luckenbach v. *McCahan Sugar Co.*, 248 U. S. 139	29
Maine, The v. *Williams*, 152 U. S. 122	29
Martello, The, 153 U. S. 64	15, 23
Martin v. *Herzog*, 228 N. Y. 164	16

PAGE

Material Service, The, 1937 A. M. C. 925..... 22
May v. *Hamburg-Amerikanische* (*The Isis*), 290 U. S. 333 16

New York Marine No. 10, The, 109 F. (2d) 564...25, 27, 28

O'Hara v. *Luckenbach S. S. Co.*, 269 U. S. 364....19, 22, 30

Pacific Mail S. S. Co., In re, 130 F. 76..... 15
Petition of Diamond Coal & Coke Co., 297 F. 238 (affirmed by C. C. A. 3, 297 F. 246, certiorari denied 265 U. S. 595)..... 28
Pendleton v. *Benner Line*, 246 U. S. 353..... 29
Pennsylvania, The, 19 Wall. (86 U. S.) 125, 15, 21, 22, 23, 24, 27, 29
People's Coal Co. v. *Second Pool Co.*, 181 F. 609.... 22

Rambler, The (C. C. A. 2), 290 F. 791..... 25
Richardson v. *Harmon*, 222 U. S. 96.....18, 29
Richelieu Navigation Co. v. *Boston Insurance Co.*, 136 U. S. 408.....22, 23
Rolph, The, 299 F. 52..... 15

Silver Palm, The (C. C. A. 9), 94 F. (2d) 776..... 26
Southern Pacific Co. v. *United States* (C. C. A. 2), 72 F. (2d) 212..... 25
Spencer Kellogg Co. v. *Hicks*, 285 U. S. 502..... 30

United States v. *Union and Dalzelline*, 1932 A. M. C. 1331 15

Valentine, The, 131 F. 352..... 16
Virginia, The, 264 F. 986.....18, 20

Waring et al. v. *Clarke*, 5 How. (46 U. S.) 441..... 23

84 H, The (C. C. A. 2), 296 F. 427..... 25

OTHER AUTHORITIES CITED:

	PAGE
46 U. S. C. 183 (R. S. 4283)	26
46 U. S. C. 192 (Section 3 of the Harter Act, Act of Congress February 13, 1893, Chap. 105, Sec. 3, 27 Stat. 445)	2, 3, 16
R. S. 4463	8
Act of March 13, 1913, Chap. 118, §2 (37 Stat. 733)	8, 12, 13, 19
46 U. S. C. 223 (R. S. 4463, as amended by the Act of March 3, 1913, Chap. 118, §2, 37 Stat. 733, amended by the Act of May 11, 1918, Chap. 72, §2, 40 Stat. 549)	2, 3, 8, 13
46 U. S. C. 673 (as amended June 25, 1936, Chap. 816, §2, 49 Stat. 1934, and as amended June 23, 1938, Chap. 597, 52 Stat. 944)	9, 10
Congressional Record, Vol. 48, Part XI, 62nd Congress, 2d Session, pp. 10687-10689	9
House Reports, Vol. 3, Report 648, 62nd Congress, 2d Session, 1911-1912	9
Century Dictionary and Encyclopedia, Vol. X—1913.	11
Funk & Wagnall's Practical Standard Dictionary	11
A Naval Expositor, by Thomas Riley	11
Oxford English Dictionary, Vol. 10, Part 2	11
Spencer on Marine Collisions	24
Webster's International Dictionary	11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

ALASKA STEAMSHIP COMPANY, a corporation, Owner of the American Steamship "DENALI",
Petitioner,

—against—

PACIFIC COAST COAL COMPANY, a corporation, *et al.*, and UNITED STATES OF AMERICA,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement.

The petitioner fails to state accurately the findings of the Courts below, and the record as originally filed in this Court did not include all the evidence received by the Circuit Court of Appeals; hence a supplemental record has now been printed and filed in this Court, which contains that evidence (S. R.* 5661-5672). Nor did it include an order of the Circuit Court of Appeals modifying its opinion (S. R. 5676-5677).

The case involved the loss of respondents' cargo, shipped on petitioner's steamship "Denali" on or about May 16, 1935, at Seattle, to be carried by

* The Supplemental Record is referred to by the letters "S. R."

her as a common carrier to various ports in Alaska, for an agreed freight. She did not perform her contract and failed to deliver any of the cargo, which after the stranding of the "Denali" off Zayas Island, British Columbia, became virtually a total loss.

The District Court (U. S. D. C. for the Western District of Washington) found that the pilot and third officer of the "Denali", both of whom were acting as watch officers at the time of the stranding, although landmarks were visible, ran the "Denali" on a rock, which they knew was in her path, when all they needed to do to avoid this known danger was to stop the engines or to change her course to avoid this rock—Finding XI (R. 5458-5460), and that this negligence caused the loss. It held that the owners of the "Denali" were not liable for this negligence of the pilot and third officer, because Section 3 of the Harter Act (Act of Congress, February 13, 1893, Chap. 105, Sec. 3, 27 Stat. 445, 46 U. S. Code, Sec. 192) exonerated her owners from loss caused by the negligence of the ship's officers (R. 5460-5461). The District Court further found that the stranding occurred without the privity or knowledge of the petitioner (R. 5460).

The respondents appealed from this decision of the District Court to the Circuit Court of Appeals for the Ninth Circuit and assigned error because the proof showed that the petitioner had habitually disregarded a safety statute of the United States, enacted to prevent shipowners from maintaining unreasonably long hours of watch duty for ship's navigating officers. The statute required that the mates stand in three watches (Act of March 3, 1913, Chap. 118, §2, 37 Stat. 733; Act of May 11, 1918, Chap. 72, §2, 40 Stat. 549, 46 U. S. Code, §223).

On the "Denali" the mates stood in two watches, watch and watch, and did not stand in three watches (R. 5614, 5628, 5633). Thus the mates were compelled to stand watch on the bridge for six hours at a time instead of four, and their rest period between each watch was shortened by two hours. Respondents contended that a violation of this positive mandatory statute, which was designed to prevent just such a disaster as that which occurred to the "Denali", constituted want of due diligence to make her seaworthy, and that, because exoneration under the Harter Act was conditioned upon due diligence to make a vessel seaworthy, the Harter Act did not apply. The respondents also appealed from the finding that the stranding was without the privity or knowledge of the petitioner, because petitioner was privy to the breach of the statute.

The Circuit Court of Appeals sustained the respondents in both these respects (R. 5622-5625).

Petitioner obtained a rehearing from the Circuit Court of Appeals, but after full new briefs (the petitioner's argument in connection with the rehearing alone occupied 282 pages of printed matter), the Circuit Court of Appeals adhered to its former decision (R. 5632-5651). Petitioner now seeks to have the case reviewed by this Court.

In presenting its petition for certiorari, petitioner makes at least four assertions of fact which are in square conflict with the findings of the Circuit Court of Appeals. The Circuit Court of Appeals found that the petitioner's vessel, which failed to carry respondents' cargo to destination, was not manned as required by a safety statute of the United States, in that her mates did not stand in three watches, and that a watch and watch system, or a two-watch system, was maintained on the "Denali", which required watch officers to stand alternating watches six hours on and six hours off.

To make out any case to present to this Court the petitioner apparently found it necessary to make the following assertions:

(1) "The three mates on the 'Denali' were divided into watches by the master" (Petition, p. 4).

(2) "The second and third mates serving 8 hours navigating duty each day in periods of 6 hours and 2 hours each, the third mate serving 6 hours from 12:00 midnight to 6 A. M. and 2 hours from 4:00 P. M. to 6:00 P. M. daily" (Petition, p. 4).

(3) "The first mate not only relieved the Master on his watches, but regularly did likewise with the pilot for short intervals" (Petition, p. 4).

On May 17 the first mate "stood a 4 hour watch alternating with the second and third mates and a 4 hour watch with the second mate; on May 18 he stood a 4 hour watch alternating with the second and third mates" (Petition, p. 4).

(4) The Circuit Court of Appeals arbitrarily found that the pilot was a substitute for the first mate (Petition, p. 5).

Each of these assertions is in the teeth of the findings of the Circuit Court of Appeals, findings which required consideration of a record of more than five thousand pages in length.

(1) The entire Court found that the three mates were not divided into three watches (R. 5614, 5628, 5633). The Court found that the master and pilot stood watch and watch and that the second mate assisted the master and the third mate assisted the pilot. Hence, there was a two-watch, not a three-watch system on the "Denali" (R. 5613-5617). The majority found that this was "by the act of the Company's management" (R. 5623). The minority found: "Their failure to comply with §2 was known to and tacitly, if not expressly, approved by appellee" (R. 5628). On rehearing the Court restated its findings: "Our findings disagreed with the district court with regard to the method in which the *'Denali's' owner* managed her with respect to the working hours of her navigating mates" (R. 5633).* "We found that the petitioning corporation owner of the 'Denali' was privy to the navigation of the vessel when wrecked, because it was by its regulation and established practice that the navigating mate in the maneuvers leading to the strand commanded the vessel while he was and had been violating the three watch requirement of the statute by standing 12 hours per day in navigating during the entire voyage" (R. 5633-4).

* Italics throughout this brief are our own.

This finding of the Circuit Court of Appeals makes inadmissible petitioner's assertion that the master divided three mates into watches. The *three* mates were never divided into watches, and the owner, not the master, was responsible for the watches on the "Denali".

(2) The Circuit Court of Appeals found that both the second and the third mate "each in fact stood more than 8 hours watch duty" each day (R. 5616).

In a footnote at page 4 of the petition it is said: "The conclusion of the Circuit Court of Appeals that the third mate exceeded 8 hours watch duty is unsupported by the evidence." Petitioner in making this statement apparently forgot the testimony of the master of the "Denali", which is quoted at length by the Circuit Court of Appeals in its opinion (R. 5615-5616). In addition to that testimony, petitioner forgot the following testimony: R. 1606-1618, 1865, 1874-77, 1884-87, 2144, 2215, 2218, 2226, 2278, 2334-6, 2339, 2342, 2346, 2410, 2412, 2426, 2427, 2443, 2466, 2468, 4453, 4458, 1569, 1739-43, 1841, 1842. All of this testimony supports the Circuit Court of Appeals.

(3) The Circuit Court of Appeals found: "The first mate stood no regular watch on the voyage in question and this was the custom on the Steamship Company's 19 vessels in the Alaska trade, though he occasionally relieved the Captain and second mate" (R. 5615). This finding was substantially the same as that of the District Court, which found: "In the Alaska trade the chief mate does not stand a regular watch at sea but does on occasion relieve the other watch officers" (R. 5476).

It also found that the first mate of the "Denali" did not act as a mate on the voyage (R. 5633). These

findings of the Circuit Court of Appeals are fully sustained by the evidence (R. 1331, 1332, 2156, 2163, 5476, 5477). Indeed, one of the reasons why the petitioner employed Pilot Obert, according to Superintendent Murphy, a former director of the petitioning corporation, was so "that the first mate can be relieved of his navigating duties" (R. 1452). Cleasby, the first mate testified that he stood "no regular watch". "In spare time" he "used to spell off the captain" (R. 2131).

(4) The finding of the Circuit Court of Appeals that the pilot was a substitute for the first mate was in no sense arbitrary. Indeed, the District Court made a like finding. It said: "That substitution of the master and pilot as watch officers for the chief mate may not be said to be a literal compliance with the statutory scale" etc. (R. 5477). Further, the District Court found: "Pilot Obert was in fact used as a pilot and as an additional watch officer" (R. 5476). Further: "Captain Healy, the master, and Captain Obert, the pilot, each did on the 'Denali' stand alternating watches of 6 hours on and 6 hours off, it being the practice (which was followed in this case) to substitute the master or pilot as watch officer in the place of the chief mate" (R. 5476). In view of these concurrent findings, it is, of course, unnecessary to cite passages from the testimony to support them. These concurrent findings make inadmissible the petitioner's statement that the Circuit Court of Appeals arbitrarily found that the pilot was a substitute for the first mate.

The safety statute violated by petitioner (46 U. S. C. §223) required that a vessel of the character of the petitioner's S. S. "Denali" should have a minimum complement of three mates who were required to stand in three watches, i. e., four hours on the bridge for each watch—that is eight hours out of every twenty-four.

The statute (R. S. 4463, amended by the Act of March 3, 1913, Chap. 118, §2, 37 Stat. 733, amended by the Act of May 11, 1918, Chap. 72, §2, 40 Stat. 549, 46 U. S. C. §223), the pertinent parts of which are printed in the opinion of the Circuit Court of Appeals (R. 5611-5612), was an amendment of R. S. 4463, first amended by the Act of March 3, 1913, Chap. 118, §2, 37 Stat. 733. This amendment which carried into the law the provision that the mates shall stand in three watches was known as the Hardy Bill. The Act was one of a series of statutes whereby Congress sought to promote safety at sea, by prescribing decent working conditions and hours of labor aboard steam vessels. Mr. Hardy, the father of the bill, in his address to Congress, sets forth the need for the legislation. In referring to the three-watch provision, Mr. Hardy said: "The officer while in charge of a watch is responsible according to law for the vessel's safe navigation," etc. He reviewed the evils which existed on American vessels resulting from long hours of watch duty, and while referring to defects in sight and hearing of watch officers, he said: "We are told that these defects are sometimes caused by long strain and overtaxing the physical powers." He cited with approval a letter from a ship's officer approving the carrying of "three officers, and each

takes his regular watch of four hours on the bridge—that is, 8 hours out of every 24" (Congressional Record, Vol. 48, Part XI, 62nd Congress, 2d Session, pp. 10687-10689). A reading of the testimony taken by Congressional Committees which led to this legislation, leaves no doubt that Congress was determined to abolish the watch and watch system which subjected watch officers to 12 hours duty in each 24 hour day, and to substitute therefor a three-watch system, *i. e.*, a system whereby a watch officer was to take a turn for four hours out of each twelve hours. In passing it may be observed that under the watch and watch system no watch officer ever had a period of uninterrupted sleep for as much as eight hours.

The Committee of the House of Representatives which considered the bill, was determined that no Local Inspectors should be permitted to relieve a shipowner from the *minimum mandatory scale* provided by the statute. It is stated in its report to Congress that the provisions of the Act constituted a minimum requirement and were made mandatory because the Committee believed that it was unsafe to leave with the Local Inspectors any discretion to go below the minimum scale. The Committee "deemed it necessary to guard against a vessel being by overpersuasion or influence or carelessness permitted to go to sea so poorly officered as to be unsafe herself and a menace to other vessels" (62nd Congress, 2d Session, 1911-1912, House Reports, Vol. 3, Report 648).

The last of the series of statutes designed to correct labor conditions at sea were 46 U. S. C. §673, as amended June 25, 1936, Chap. 816, §2, 49 Stat. 1934, and as amended June 23, 1938, Chap. 597, 52

Stat. 944. The first of these amendments provided for the three-watch system not only for firemen, oilers and water tenders, but extended it to coal passers, sailors and licensed officers, thus limiting all routine work as well as watch duty for licensed officers to eight hours per day. The second of these amendments, that of 1938, went further and extended the provision to the personnel of tugs and of vessels operating on the Great Lakes. Up to 1938 all of these provisions, both as to routine and watch duty, had been confined to seagoing vessels. Thus, by gradual steps the mandatory minimum provision as to eight hours a day has now been extended to all classes of marine work and to all classes of marine vessels; whereas at the time of the "Denali" disaster the eight hour day was limited to *watch duty* on seagoing vessels of more than 1000 tons, engaged in voyages of 400 miles or more. We mention this limitation because of the insistence in the petition and brief that the six hour watches on certain Pacific Coast vessels, on the Great Lakes and on tug-boats, was overlooked by the Circuit Court of Appeals and should have caused the Circuit Court of Appeals to regard six hours rather than four hours as a proper period for watch duty. The truth is that Congress always regarded both the Great Lakes and the tug-boats as special cases, and did not subject them to the three-watch requirement until the Amendment of 1938, so that they might continue with six hour watches. It is significant, however, that the statute was not so worded as to permit Pacific Coast vessels, even in daytime, to continue to use watches of six hours' duration. Congress nowhere excepted such vessels from the general operation of the law.

Nautical Meaning of the Word "Watch".

Petitioner criticises the Circuit Court of Appeals for the definition which it gave to the word "watch" (Brief, p. 6). The criticism was vigorously urged on rehearing. To meet that criticism, respondents collected definitions of the word "watch" from thirty or more American and English dictionaries and encyclopedias, and submitted them to the Circuit Court of Appeals. All of these definitions sustain the Circuit Court of Appeals in its statement that in Anglo-Saxon countries the word "watch signifies a period of four hours". The Oxford English Dictionary, Vol. 10, Part 2, under "watch" summarizes many authorities, beginning with the year 1585 and running down to 1908. It defines "watch" as a period of four hours.

"A Naval Expositor", at p. 183, by Thomas Riley Blanckley, published in London in 1750, states:

> "Watch—Signifies the space of four hours, because half of the ship's company watch and do duty in their turns, so long at a time, who are divided into two parts, the larboard, and the starboard watch."

The Century Dictionary and Encyclopedia, Vol. X —1913, under "Watch-Naut." says: "The period of time called a *watch* is four hours, the reckoning beginning at noon or midnight." See also Webster's International Dictionary and Funk & Wagnall's Practical Standard Dictionary. We were unable to find any American or English dictionary which specified a longer period than four hours as the length of a watch.

Four questions are presented to this Court by the petitioner. None of those questions are of sufficient importance to warrant a review by this Court.

The petitioner presents four questions to this Court as a basis for certiorari. It is submitted that these questions on analysis involve questions of fact, found against petitioner on a voluminous record, and issues on which there is no conflict of decisions between the circuits.

Question No. 1 deals largely with two questions of fact: (1) That the pilot was not acting as a substitute for the first mate, whereas both courts below found that he was so acting, and (2) that the third mate stood watch for eight hours only, whereas the Circuit Court of Appeals held that he did in fact stand watch for more than eight hours. In this question petitioner also criticises the Circuit Court of Appeals for interpreting the three-watch provision as limiting the watch period to four hours. This criticism is without substance. In so interpreting the statute the Court gave the statute the precise meaning as that given it by the Department of Commerce at the time when the three-watch provision was first placed in the statute, viz., R. S. §4463, as amended by the Act of March 3, 1913.

The first of these questions (Petition, p. 9) deals with findings of fact, viz., that the Circuit Court of Appeals erred (1) in applying the three-watch provision to the pilot (in other words, that the Circuit Court of Appeals was mistaken in its finding of fact that the pilot was a substitute mate—see *ante*, p. 7), and (2) in finding as a fact that the third mate stood watch for more than eight hours a day

(see *ante*, p. 6). This Court should not be burdened with either of these factual propositions.

The criticism directed at the Circuit Court of Appeals for interpreting the word "watch", used in §4463, as amended by the Act of March 3, 1913 (46 U. S. Code §223), as meaning a period of four hours, is without substance. As shown above, the Court in giving this interpretation to the Act merely applied the well established dictionary meaning of the word. In addition it gave the word the departmental construction which had been officially promulgated twenty-seven years ago:

> "This Bureau is in receipt, by reference, of your letter of the 16th instant, * * * concerning the interpretation of Section 4463, Revised Statutes, as amended, the specific question asked being whether or not it is necessary that the three mates required on ocean-going passenger steamers of over 1,000 tons must stand watches of equal length.
>
> In reply you are informed that my opinion is that under the provisions of Section 4463, as amended, the mates should stand in three watches, and not as was formerly the practice in the majority of instances, of watch and watch, with the same period of relief as of duty, that is to say, four hours on and four hours off; and the purpose of the law was to give further relief in watch duty, which would reasonably seem to be four hours on and eight hours off. * * *" (Letter of Supervising Inspector Hoover, dated May 6, 1913—See S. R., pp. 5661-5662).

The letter of Mr. Allan D. Jones, referred to by petitioner and printed in the Appendix to the peti-

tion, at p. V, which states that there had been no ruling on this subject, is not in the record. Unfortunately the letter was obtained by the petitioner *ex parte,* and apparently Mr. Jones's attention was never directed to the circular of 1913. In passing it should be observed that even if the petitioner's contention should succeed, that would not assist petitioner, because the Courts below have found concurrently that the mates did not stand in three watches (see *ante,* p. 5).

Question 2: Petitioner's Question 2 ignores the Congressional mandate prescribing a minimum scale for safe navigation of steam vessels. The Circuit Court of Appeals correctly decided that when a shipowner habitually permits his vessels to be navigated with a two-watch system, when Congress by statute had required a three-watch system for safe navigation, such failure to comply with the Congressional mandate constituted want of due diligence to make its vessel seaworthy. There is not any conflict of authority on this point.

The second question presented by the petition (Petition, p. 10) is, whether a violation of a statute designed to promote safety renders a vessel unseaworthy? Seaworthiness merely means safety for navigation at sea. Therefore, when Congress provides that for a vessel to be safe for navigation at sea her mates shall stand in three watches, a vessel which does not maintain such watches is unseaworthy. No other conclusion is possible unless it is permissible for a Court to substitute its judgment for that of Congress as to what constitutes safety for navigation at sea. Congress was unwilling to permit the Local Inspectors, who are seafaring men, to substitute their judgment for that of Congress (*ante,* p. 9). Certainly it never intended that

judges, who are not seafaring men, should substitute their judgment for that of Congress. It is well settled by decisions of this Court that when Congress prescribes for safe navigation a specified instrument, such as a foghorn, no substitute is permissible, although a Court may think the substitute just as good. *The Pennsylvania*, 19 Wall. (86 U. S.) 125; *The Martello*, 153 U. S. 64. The circumstance that the legislative mandate concerns the use of human beings, rather than mechanical instruments, does not alter the rule; for, as was said by Judge Hough in *United States* v. *Union and Dalzelline*, 1932 A. M. C. 1331, 1336: "It is a matter of common knowledge that safety in anything which requires human effort depends, in the last analysis, on the human being. A weary man is infinitely more dangerous than a defective pipe or an obscured light, because he is unfit to discover the unfitness of the inanimate object."

It has long been settled that to be seaworthy a vessel must be adequately manned with a crew "competent for their duties with reference to all the exigencies of the intended route". *The Lady Pike*, 21 Wall. (88 U. S.) 1, 15; *In re Pacific Mail S. S. Co.*, 130 F. 76, 82; *The Rolph*, 299 F. 52, 54. This duty rests upon a shipowner by the general maritime law.

The petitioner says that the present case conflicts with the decision of the Circuit Court of Appeals for the Second Circuit in the case of *Hartford & New York Transp. Co.* v. *Rogers & Hubbard Co.*, 47 F. (2d) 189, 191. That case did not hold that a shipowner might disobey a positive mandate of statute and be seaworthy. The Court held as a fact that the charge of unseaworthiness which related to the crew was "unsupported by the evidence". The Court found as a fact that the crew performed all the

services required of it and that the crew was in fact entirely competent. *The Hartford & New York Transp. Co.* case cannot be pushed beyond this finding of fact. It is worthy of note, however, that the legal conclusion in that case, to the effect that a shipowner was entitled to the benefit of the Harter Act unless it was shown that his want of due diligence to make the vessel seaworthy did have a causal relation with the loss, was later squarely overruled by this Court in *May* v. *Hamburg-Amerikanische* (*The Isis*), 290 U. S. 333.

As was said by Judge Cardozo, while speaking for the Court of Appeals of the State of New York, in *Martin* v. *Herzog,* 228 N. Y. 164, at page 168:

> "We think the unexcused omission of the statutory signals is more than some evidence of negligence. It *is* negligence in itself. Lights are intended for the guidance and protection of other travelers on the highway (Highway Law, sec. 329a). By the very terms of the hypothesis, to omit, wilfully or heedlessly, the safeguards prescribed by law for the benefit of another that he may be preserved in life or limb, is to fall short of the standard of diligence to which those who live in organized society are under a duty to conform." (Italics are the Court's.)

The Circuit Court of Appeals in holding that there had been want of due diligence to make the "Denali" seaworthy, was supported by all of the authorities. As long ago as the case of *The Valentine,* 131 F. 352, 355, it was said:

> "* * * and if the owners approve, suffer, or connive at such custo. 1 or practice, such vessel is not properly manned, nor do the owners intend

that the initial equipment and crew shall perform the duties for which they are provided."

The decision of the Circuit Court of Appeals on this question was clearly correct and there is no conflict between the authorities.

Question 3: An habitual, or customary, failure to comply with a statute designed to promote safe navigation known to a shipowner, constitutes privity and knowledge. The only real question is one of fact, viz., did the petitioner habitually and customarily fail to comply with a statute designed to promote safe navigation? The Court found as a fact that the petitioner did habitually fail to comply with that statute, and was in privity in and had knowledge of the mate's navigation of the ship in violation of the safety act at the moment of her running at full speed on the charted reef. There is no conflict of authority on this point.

The question of fact thus raised by petitioner was decided against it in accordance with uncontradicted testimony of petitioner's own witnesses by the Circuit Court of Appeals:

> "The 'Denali's' owner's privity in and knowledge of the mate's navigation of the ship in violation of the Safety Act at the moment of her running at full speed on the charted reef are affirmatively established by the proof" (S. R. 5676).

This finding of fact should make further discussion under this heading unnecessary, especially as petitioner's third question is based upon the assumption that a customary violation of a safety statute does not justify a finding of privity and knowledge. In presenting this assumption, petitioner not only ignores the finding of the Circuit Court of Appeals which

we have just cited, but also the further finding that the failure to maintain a three-watch system was "by the act of the Company's management" (R. 5623), or, as put in the minority opinion: "Their failure to comply with §2 was known to and tacitly, if not expressly, approved by" petitioner (R. 5628).

The petitioner says that there is a conflict on this question between the decision below and the decision in *The Virginia*, 264 F. 986; *Hines* v. *Butler*, 278 F. 877 (which merely affirmed and adopted the view of the District Court in *The Virginia*); and *La Bourgogne*, 210 U. S. 95, 122. This contention is without foundation. It is nowhere held in either of these cases that, when a shipowner habitually permits a practice which necessarily results in disregarding a statutory minimum requirement for safe navigation, such shipowner is not in privity with the breach of the statutory mandate. In *The Virginia*, in order that its decision might not be misunderstood, the Court made specific reference to *Richardson* v. *Harmon*, 222 U. S. 96, in the following language:

> "But, as *Richardson* v. *Harmon* declares, there are neglects that will. Perhaps the owner cannot deny privity or knowledge, if the disaster happened in whole or in part because he more or less consciously took a chance or closed his eyes to something he did not want to be bothered about, or because in some other way he fell short of what a fair-minded, well-informed, and impartial man would feel was his moral duty in the premises" (264 F. 997).

The real question then is one of fact, viz., did petitioner do what "a fair-minded, well-informed, and impartial man would feel" should have been done, when

it habitually for many years sent each steamer of its fleet of nineteen vessels to sea, so manned that it knew that a safety statute of the United States would be violated? This question of fact has been decided against petitioner.

This Court, in *O'Hara* v. *Luckenbach S. S. Co.*, 269 U. S. 364, 370, directed attention to the fact that Congress regarded these safety statutes as of great importance, and in adopting statutory "watch" provisions had in mind providing a crew "competent and in a state of readiness 'for any exigency that is likely to happen'—such as a collision, the striking of the ship upon a reef of rocks or an iceberg, the sudden breaking out of fire, and other happenings of like disastrous tendency", etc. In other words, to hold otherwise than did the Circuit Court of Appeals, one must say that the very purpose of the statute may be ignored by a shipowner.

An examination of the record in *The Alameda* case (a case which involved another of petitioner's vessels —S. R. 5669) shows that more than twenty-five years ago—on May 24, 1913—the petitioner knew of the statute (R. S. 4463, as amended by the Act of March 3, 1913, Chap. 118, §2, 37 Stat. 733) and at that time it did provide three mates who worked four hours on and eight hours off during the trip leaving Seattle. The ruling was based upon the three mates standing "a regular bridge watch of four hours on and eight hours off" (S. R. 5671). During the intervening years, but still many years ago, the petitioner abandoned obeying the statute and permitted a practice to grow up where the pilot substituted for the first mate. Under that system, six hour watches—watch and watch—were maintained in utter disregard of the statutory mandate (R. 5617). Even if ignorance

of the law were an excuse, it is not an excuse when that ignorance is backsliding ignorance.

We submit that the finding below should not be disturbed. That finding is:

> "We found that the petitioning corporation owner of the 'Denali' was privy to the navigation of the vessel when wrecked, because it was by its regulation and established practice that the navigating mate in the maneuvers leading to the strand commanded the vessel while he was and had been violating the three watch requirement of the statute by standing 12 hours per day in navigating during the entire voyage" (R. 5633-34).

Nor is *La Bourgogne*, 210 U. S. 95, 122-127, in any way in conflict with the decision below. This Court, as did the Court in *The Virginia*, recognized that the question was really one of fact. At 210 U. S. 126, 127, this Court stated that the claimants in *La Bourgogne* had not properly sustained the burden which was on them in that case. The passage quoted at 210 U. S. 126 from the opinion of the Circuit Court of Appeals in *La Bourgogne*, conclusively shows that the decision in that case went off on the fact that the Court could "not find that the petitioner's officers knowingly tolerated or encouraged" a breach of a statutory mandate. Here the finding is that the petitioner did knowingly tolerate a breach of a statutory mandate designed to prevent loss of life and property.

There is no conflict of decision on this question, or other reason for burdening this Court by reason of anything contained in petitioner's third question.

Question 4: A. The rule in *The Pennsylvania* (*The Pennsylvania*, 19 Wall. (86 U. S.) 125, 136) is not confined to collision cases. There are many cases which apply the rule to other than collision cases. Principle does not require that the rule be so confined. B. Nor is the rule in *The Pennsylvania* confined to questions of liability. When, as in the present case, the only excuse which a shipowner has for failing to deliver cargo is negligence of the ship's officers, and the shipowner is unable to show that such negligence was not the result of the shipowner's failure to conform to a statute of the United States designed to keep watch officers alert, then it cannot be said that the loss was occasioned without the personal fault or neglect of the shipowner. There is no conflict of authority on either of these points.

Question 4 relates to the application of the rule in *The Pennsylvania*, 19 Wall. (86 U. S.) 125, 136, which provides that when a vessel is in active violation of a statutory mandate at the time of a disaster then the burden is upon the owner of the vessel to prove that the failure to comply with the statutory mandate not only did not but could not have contributed to the disaster.

A. Petitioner contends that the Circuit Court of Appeals erred in applying the rule to a non-collision case.

The decision of the Circuit Court of Appeals is supported by cases from this Court, and from the Second, Third, Sixth, Seventh and Ninth Circuits, where the rule was applied in other than collision cases (R. 5636-5646). As long ago as *The M. M. Chase*, 37 F. 708, 713, Judge Addison Brown applied the rule to a statute of the State of Maine dealing with attachment of goods by a sheriff of that State, and in the other cases cited from this Court and

from the various circuits, the rule was applied to strandings—*Richelieu Navigation Co.* v. *Boston Insurance Co.*, 136 U. S. 408, 422-3; *Flint & P.M.R. Co.* v. *Marine Insurance Co.*, 71 F. 210, 215; to a sinking—*The Material Service*, 1937 A.M.C. 925, 930; to striking a bridge—*Dorrington* v. *City of Detroit*, 223 F. 232, 246; and to striking a sunken vessel—*People's Coal Co.* v. *Second Pool Co.*, 181 F. 609, 611.

In *The Pennsylvania*, 19 Wall. (86 U. S.) 125, at page 136, this Court said that the reason for the rule was "to enforce obedience to the mandate of" safety statutes. With this reason in mind it is difficult to imagine a more appropriate case for the rule than that which is now presented to the Court. The "Denali" was run upon a rock while she was being navigated in violation of a statute enacted by Congress to prevent such a disaster. *O'Hara* v. *Luckenbach S. S. Co.*, 269 U. S. 364, 370. If the rule is not to be enforced in a case of this character, the purpose of Congress will be frustrated. The rule was adopted to prevent that result.

Petitioner suggests (Brief, p. 26) that the rule was adopted because it was desired to reduce confusion which might result because the navigators of one moving vessel would not know what another moving vessel intended to do. He cites no judicial authority for this view of the rule, nor can any good reason be assigned for holding that the rule in *The Pennsylvania* should be so confined.

Petitioner says that we are mistaken when we say that the rule in *The Pennsylvania* was applied by this Court in the *Richelieu* case. This Court, however, took a different view from that of petitioner

in *Belden* v. *Chase*, 150 U. S. 674, at page 699, and in *The Martello*, 153 U. S. 64, at page 74. An analysis of the *Richelieu* case clearly demonstrates that the rule was applied to a stranding case (see the opinion of the Circuit Court of Appeals below (R. 5642-5643)).

The rule in *The Pennsylvania* did not originate in England, as is argued by petitioner. It originated in *Waring et al.* v. *Clarke*, 5 How. (46 U. S.) 441, 465, where this Court imposed a heavy burden of proof on a vessel which had failed to carry a signal light required by statute. Mr. Justice Wayne, who wrote the opinion in that case, reiterated what he had said in Circuit in *Bulloch* v. *The Lamar*, Fed. Case No. 2129:

> "Not carrying one or more signal lights, then, in the way required, *is the neglect of a proper precaution conducing to the safety of others.* Besides subjecting the captains and owners to the penalty of two hundred dollars, which may be recovered by suit or indictment, it will throw upon the owners of steamboats the burthen of proof, to show that collisions which may occur, under such circumstances, are not owing to such neglect. I would require from them the same proofs, under like circumstances, in the case of a boat being swamped by the swell of a steamer, made by her rapid passage through the water" (4 Fed. Cas. 658).

In passing it may be observed that damage from a swell is not a collision within the narrow maritime definition of "collision". Because in "its strict legal sense [the term] does not include the contact of

vessels with *rocks*, sunken obstructions, or other fixed structure" (*Lehigh & Wilkes-Barre Coal Co.* v. *Globe & Rutgers Fire Insurance Co.*, 6 F. (2d) 736, 740, quoting Spencer on Marine Collisions), petitioner seems to hold the view that the rule should not be applied in the present case.

If petitioner's argument that the rule in *The Pennsylvania* should be limited to collision cases is valid, then the term "collision" should not be restricted so as to exclude contact with a rock from that term.

The "Denali" ran upon a reef of rocks, a type of disaster which the statute was designed to avoid, while she was in actual violation of a mandate of Congress intended to avoid a happening of that disastrous tendency. As was said by the Circuit Court of Appeals:

> "By good luck the 'Denali', run by the navigating mate at full speed on a charted reef, held fast. Had she struck on a course slightly more to her right, her port side well might have been torn out by the easterly edge of the reef and the vessel quickly capsized with heavy loss of life to her passengers and crew in the strong cold currents of the Alaskan waters. It was on an Alaskan voyage that *The Princess Sophia*, 61 F. (2d) 339, also ran on a reef, with a total loss of sailors, passengers, cargo and steamer. In our opinion the three watch provision for mates is for the purposes of minimizing such danger to human beings as well as to prevent loss to cargo. The identical issue of presumption of causation would be presented had the widow of a drowned sailor been the appellant instead of the United States or any other cargo owner" (R. 5635).

The petitioner failed in the present case to introduce any evidence to establish that the disaster could not have been the result of weariness of the watch officers of the "Denali" (R. 5621). Clearly in such a case the burden of proof imposed upon the petitioner has not been met. The Circuit Court of Appeals correctly disregarded the so-called finding of the District Court to the effect that the negligence of the watch officer was the sole cause of the disaster. In doing so it applied the same reason as that used by this Court in *The Edwin I. Morrison*, 153 U. S. 199, 215. The dissenting judge below apparently failed to note the concluding paragraphs of this Court's opinion in the *Morrison* case.

Petitioner at pages 34 to 36 of its brief cites *El Sol*, 45 F. (2d) 852, 855, affirmed *sub. nom. Southern Pacific Co.* v. *United States* (C. C. A. 2), 72 F. (2d) 212, 214; and in a footnote at page 12 of the petition, there seems to be a suggestion that this last mentioned case is in conflict with the decision below. The *Southern Pacific* case is not in conflict with the decision below. Although it affirmed *El Sol*, it did not adopt the rule as to burden of proof laid down in that case. On the contrary, it adhered to its former decisions, *The Rambler*, 290 F. 791, 792; *The 84-H* (C. C. A. 2), 296 F. 427; *In re Liverpool, Brazil & River Plate S. N. Co.* (C. C. A. 2), 57 F. (2d) 176. In the first of these cases, the Court (Hough, *J.*, writing), held that after liability had been established "it remains for the petitioner affirmatively to show that it is entitled to limit in accordance with the statute" (290 F. 792). The Circuit Court of Appeals for the Second Circuit has no doubt as to the meaning of *Southern Pacific Co.* v. *United States*, because in the very recent case of *New York Marine No. 10*, 109

F. (2d) 564, 566, in speaking of a petitioner's failure to comply with the burden of proof as to the privity, it said: "it has not disproved its privity, which it must do to limit liability. *The Rambler*, 2 Cir., 290 F. 791, 792; *The 84-H*, 2 Cir., 296 F. 427, 432; *Southern Pacific Co.* v. *United States*, 2 Cir., 72 F. 2d. 212, 214." The rule is the same in other circuits. See *The Silver Palm* (C. C. A. 9), 94 F. (2d) 776, 777, where the authorities are collected.*

---

* *Earle & Stoddart* v. *Ellerman's Wilson Line*, 287 U. S. 420, 425, cited by petitioner at page 36 of its brief, deals with exceptive language used in the Fire Statute, viz., "unless such fire is caused by the design or neglect of such owner". The Court held that this language throws the burden of proof on the cargo owner. The language in the Limitation Statute differs from that in the Fire Statute. It is:

> "SEC. 183. LIABILITY OF OWNER NOT TO EXCEED INTEREST. The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, *done, occasioned, or incurred without the privity, or knowledge of such owner or owners*, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending" (R. S. Sec. 4283, 46 U. S. C. Sec. 183.)

The Courts uniformly, with the exception of the discredited *El Sol*, 45 F. (2d) 852, 855, discussed above, hold that such language throws the burden of proof upon the shipowner to establish that he is entitled to limit his liability. In the English Fire Statute the language is similar to that contained in the Limitation Statute, and the House of Lords held that the burden of proof was on the shipowner to show that a loss by fire happened without his actual fault or privity. *Lennard's Carrying Company* v. *Asiatic Petroleum Company, Ltd.* (1915), A. C. 705. In that case Lord Haldane said "that Mr. Lennard ought to have gone into the box and relieved the company of the presumption which arises against it that his action was the company's action" (1915 A. C. at p. 714). The situation in that case was strikingly like the one presented here, in that the shipowner has wholly failed to offer any evidence as to the physical condition of either Obert, the pilot, acting as first mate, or Lawton, the third mate (R. 5621, 5622).

B. Petitioner argues that because it was already liable for breach of contract, it should be permitted to limit its liability, although it was unable to show that its breach of a safety statute did not contribute to respondents' loss. The only excuse which petitioner offers for its failure to carry respondents' cargo is that its own servants were negligent. The Court found as a fact that petitioner had not been able to show that its violation of a safety statute, designed to prevent the very disaster which occurred, did not contribute to the negligence of those servants (R. 5621-5622, 5648, S. R. 5676). In these circumstances the petitioner cannot say that it was not privy to the failure of the "Denali" to deliver her cargo. If petitioner had seen to it that a three-watch system had been maintained, the watch officers of the "Denali" might have refrained from running her full speed on a rock which they knew was in her path. The Circuit Court of Appeals has found that the petitioner failed to meet the burden of proof thus placed upon it (R. 5622, 5634). So long as this possibility has not been displaced by proof, the petitioner fails to establish its right to limitation.

There is no conflict between the circuits as to the application of the rule in *The Pennsylvania* in such a case. See *The New York Marine No. 10*, 109 F. (2d) 564, where the Circuit Court of Appeals for the Second Circuit said:

> "The charterer is therefore in the same position as if it had no privilege of limitation, and is liable in full if it is held that the absence of a second deckhand was a cause of the accident. Since the absence has been found, and the lack is admitted to be a statutory fault, (see 46 U. S.

C. A. §§ 222, 362 and 405) it is *presumed that the fault is a contributory cause, and the petitioner must bear the burden of showing that it was not. The Pennsylvania,* 19 Wall. 125, 136, 22 L. Ed. 148; *The Albert Dumois,* 177 U. S. 240, 254, 20 S. Ct. 595, 44 L. Ed. 751; *Lie* v. *San Francisco & Portland S. S. Co.,* 243 U. S. 291, 298, 37 S. Ct. 270, 61 L. Ed. 726; *The Annie Faxon,* 9 Cir., 75 F. 312, 319; *McGill* v. *Michigan S. S. Co.,* 9 Cir., 144 F. 788, 795, certiorari denied, 203 U. S. 593, 27 S. Ct. 782, 51 L. Ed. 332; *The Suffolk,* 2 Cir., 258 F. 219; *The Fulton,* 2 Cir., 54 F. 2d 467, 469; *The Annie,* D. C., 261 F. 797, 799. This burden it has not met, for it is impossible to say that the other deckhand might not have been on duty instead of Costello on the morning of the collision, had there been two deckhands on board. *On the ground that the tug was undermanned, that the charterer was privy to the undermanning, and that this fault may have been a contributing cause of the collision, the denial of limitation to the operating charterer is sustained.*" (109 F. (2d) 564, at p. 566.)

The result reached below and in *New York Marine No. 10* is the same as in *The Petition of Diamond Coal & Coke Co.,* 297 F. 238 and 243 (affirmed by the C. C. A. 3 in 297 F. 246, certiorari denied 265 U. S. 595), where the Court held that a petitioner for limitation of liability must show absence of "privity or knowledge of any matter which might have caused the accident" (297 F. 244).

The petitioner relies upon language in *Capital Transportation Co.* v. *Cambria Steel Co.,* 249 U. S.

334, in which this Court commented upon a "too easy a finding of privity and knowledge" (Brief, p. 16), but petitioner has apparently overlooked what this Court said in response to a similar argument in *Cullen Fuel Co.* v. *W. E. Hedger, Inc.*, 290 U. S. 82 (at pp. 88 and 89), viz.:

> "The petitioner urges that the denial of limitation in cases like this will sweep away much of the protection afforded to ship owners by the acts of Congress. But this view disregards the nature of the warranty. The fitness of the ship at the moment of breaking ground is the matter warranted, and not her suitability under conditions thereafter arising which are beyond the owner's control. Compare *Armour & Co.* v. *Fort Morgan S. S. Co.*, 270 U. S. 253; *The Ice King*, 261 Fed. 897; *The Soerstad*, 257 Fed. 130."

Here, as in the *Cullen* case, the fitness of the ship is what the Court had in mind. It is submitted that a shipowner should not be allowed the extraordinary privilege of limitation (*The Maine* v. *Williams*, 152 U. S. 122, 132) when it habitually violates a safety statute and its ship is lost while she is in actual violation of such statute. Beginning with *Richardson* v. *Harmon*, 222 U. S. 96, 106, and continuing in *Pendleton* v. *Benner Line*, 246 U. S. 353, 356; *Luckenbach* v. *McCahan Sugar Co.*, 248 U. S. 139, 149; *American Car & F. Co.* v. *Brassert*, 289 U. S. 261, 264, this Court has uniformly held that for personal neglect there can be no limitation.

Petitioner argues that because the rule in *The Pennsylvania* was derived from England, and because the English by statute have abandoned the rule, we

should abandon it also. If any such argument is to be made, it should, of course, be presented to Congress and not to this Court.

The Decision Below Was Eminently Just.

Petitioner complains of the injustice of the decision below. This complaint is unfounded. Petitioner before allowing the "Denali" to engage in the dangerous navigation of Alaskan waters "was under obligation to assure himself by inquiries or by personal inspection" that the "Denali" "should not incur the hazard" (*Spencer Kellogg Co.* v. *Hicks*, 285 U. S. 502, 510) of striking a reef of rocks, the type of disaster the statute, which petitioner failed to obey, was intended to avoid. *O'Hara* v. *Luckenbach S. S. Co.*, 269 U. S. 364, 367, 368, 370.

The Circuit Court of Appeals points out that a disregard of that statute was likely to bring about just such a state of physical unfitness as would cause the navigators of the "Denali" to fail in their duty (R. 5619-5622). The petitioner refrained, for reasons best known to it, from asking these men about their physical condition (R. 5621, 5622) and, indeed, from offering testimony on the general physical vigor of Pilot Obert, a man well past his middle age. "More significant, the Steamship Company did not ask Obert, its own witness, nor did he testify, whether or not he felt fatigued from his 12 hours of service as both pilot and mate in the preceding 24 hours—significant because every admiralty lawyer knows the heavy burden on his owner-client where a statutory command is violated in the navigation of its vessel" (R. 5621-5622).

In these circumstances we submit that the Circuit Court of Appeals could not avoid the conclusion that petitioner had not shown that the violation of the statute was not a direct or contributing cause of the disaster. It said:

> "Our holding was that it had not been shown that the violation was not such a direct or such a contributing cause" (R. 5634).

This result is necessary unless safety statutes designed to prevent disaster, such as occurred in this case, are to be permitted to become dead letters.

The petitioner has failed to show any conflict of decision or to present any important question of interpretation of Federal Statutes which should be decided by this Court.

The prayer of the petition should be denied.

Respectfully submitted,

T. CATESBY JONES,
JAMES W. RYAN,
LANE SUMMERS,
Counsel for Respondents.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement	3
Argument	6
Conclusion	11
Appendix	13

CITATIONS

Cases:	
Barlow v. *United States*, 7 Pet. 404	10
Hartford & N. Y. Transportation Co. v. *Rogers & Hubbard Co.*, 47 F. (2d) 189	9, 10
Hover & Co., W. A., v. *Denver etc. R. Co.*, 17 F. (2d) 881	10
La Bourgogne, 210 U. S. 95	11
Lady Pike, The, 21 Wall. 1	9
Lie v. *San Francisco & Portland S. S. Co.*, 243 U. S. 291	10
May v. *Hamburg etc. Gesellschaft*, 290 U. S. 333	10
McCrea v. *United States*, 294 U. S. 23	7
New York Marine No. 10, The, 109 F. (2d) 564	9
O'Hara v. *Luckenbach S. S. Co.*, 269 U. S. 364	7
Pennsylvania, The, 19 Wall. 125	9, 10, 11
Richelieu Navigation Co. v. *Boston Ins. Co.*, 136 U. S. 408	9
Rolph, The, 299 Fed. 52	9
Virginia, The, 264 Fed. 986, affirmed *sub nom. Hines* v. *Butler*, 278 Fed. 877	11
Statutes:	
Act of June 25, 1936, c. 816, 49 Stat. 1930	8
Act of May 11, 1918, c. 72, 40 Stat. 548, 549 (46 U. S. C., Sec. 223):	
Sec. 2	13
Sec. 3	7
Harter Act, c. 105, 27 Stat. 445 (46 U. S. C., Sec. 192):	
Sec. 3	14
Section 4283 of the Revised Statutes (46 U. S. C., Sec. 183)	15

263221—40——1

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 395

ALASKA STEAMSHIP COMPANY, A CORPORATION, OWNER OF THE AMERICAN STEAMSHIP "DENALI," PETITIONER

v.

PACIFIC COAST COAL COMPANY, A CORPORATION, ET AL., AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 5463–5482) is reported in 23 F. Supp. 145. The original opinion of the Circuit Court of Appeals for the Ninth Circuit (R. 5608–5629) is reported in 105 F. (2d) 413. The opinion of the Circuit Court of Appeals on rehearing (R. 5632–5651) is reported in 112 F. (2d) 952.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Ninth Circuit was entered June 30, 1939 (R. 5630). An order granting rehearing was entered January 5, 1940 (R. 5631). In an opinion filed June 7, 1940, the Circuit Court of Appeals on rehearing adhered to its prior ruling (R. 5651). The petition for a writ of certiorari was filed September 4, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

This action was brought by petitioner under the Harter Act for exoneration from damages to cargo resulting from the stranding of petitioner's vessel or, in the alternative, for limitation of liability under Section 4283 of the Revised Statutes. The questions are:

1. Whether petitioner violated Section 2 of the Act of May 11, 1918, providing that no vessel shall be navigated which does not have on board and in her service one duly licensed master and three duly licensed mates who shall stand in three watches while the vessel is being navigated; and if so,

2. Whether the vessel was unseaworthy within the meaning of the Harter Act;

3. Whether petitioner exercised due diligence to make the vessel seaworthy;

4. Whether the violation occurred with petitioner's knowledge or privity within the meaning of Section 4283 of the Revised Statutes; and

5. Whether petitioner was required to show that the violation of the statute could not have contributed to the stranding of the vessel.

STATUTES INVOLVED

The applicable portions of the statutes involved are set forth in the Appendix, *infra,* pp. 13–15.

STATEMENT

The petitioner, a Nevada corporation, was the sole owner and operator of the steamship *Denali,* a vessel of 3,432 tons gross and 2,164 tons net burden (R. 5448). On May 16, 1935, the *Denali* left the port of Seattle, Washington, with passengers and cargo on a voyage to various ports in Alaska (R. 5448–5449). At 2:44 a. m. on May 19, 1935, the *Denali* stranded on a reef in the waters of British Columbia, Canada, and the vessel and her cargo thereafter became a total loss (R. 5450–5451).

At the time the *Denali* sailed from Seattle, she had on board and in her service a full complement of experienced, licensed deck officers, as required by the certificate of inspection, and, in addition thereto, she had on board and in her service an experienced pilot as an additional watch and navigating officer (R. 5457). The captain, assisted by the second mate, and the pilot, assisted by the third

mate, stood alternate 6-hour watches (R. 5615–5616). The first mate stood no regular watch (R. 1606–1618). As a result, the master, the pilot, and the second and third mates generally, stood 12 hours' watch duty out of 24 hours. While there was testimony that the second and third mates were not "required" to stand watch more than 8 hours each day, the evidence also showed that "customarily" they stood on watch for a longer time (R. 5615–5616). The master and the pilot were, during the period they were on watch, in charge of the vessel, the second and third mates, respectively, acting under their direction (R. 1616–1617). This method of dividing watches was common on the vessels belonging to petitioner, and was well known to the managing officials of the petitioner (R. 1616).[1] At the time the *Denali* stranded, it was in charge of the pilot, assisted by the third mate (R. 5458). The pilot had served 12 hours' watch duty on each of the two preceding days (R. 1616–1618, 5476).

The United States had on board the *Denali* at the time of the stranding, merchandise having a value of $38,760.12 (R. 123–132). The claims of other respondents for loss of cargo exceeded $327,000 (R. 132). Suit was filed by the United

[1] Specific instructions were given by petitioner that upon entering and leaving port, changing courses, etc., the vessel always should be in the control of either the master or the pilot (R. 5617–5618).

States and other respondents as libelants against petitioner, seeking damages for the loss of cargo (R. 5451). Thereafter petitioner instituted proceedings seeking either exoneration under the Harter Act, or, in the alternative, the benefits of the limitation of liability provided for by Section 4283 of the Revised Statutes (R. 5451). The District Court found that the sole cause of the stranding was an error or fault in navigation (R. 5460), and that the petitioner was entitled to exoneration under Section 3 of the Harter Act (R. 5460–5461). On appeal, the Circuit Court of Appeals for the Ninth Circuit reversed, holding, both in its original opinion and again on rehearing, that the three watches required by Section 2 of the Act of May 11, 1918, must be divided equally each day; that the petitioner had violated Section 2 because the second and third mates and the pilot had each stood watch for more than eight hours each day; that the petitioner was not entitled to exoneration under the Harter Act because the vessel, being improperly manned, was unseaworthy, and because the petitioner had failed to show that the improper manning could not have contributed to the stranding of the vessel; and that petitioner was likewise not entitled to limitation of liability because the violation of Section 2 was done with its knowledge and privity, and petitioner had failed to show that the violation could not have contributed to the accident.

ARGUMENT

The petitioner asserts that there was no violation of Section 2 of the Act of May 11, 1918. Petitioner contends, however, that even if it violated the act it was entitled to exoneration, first, because the vessel was seaworthy in fact at the time it broke ground, and that violation of the statute did not, without more, constitute unseaworthiness as a matter of law, and second, because it exercised "due diligence" to make the vessel seaworthy. In the alternative, the petitioner asserts that it is entitled to a limitation of liability because the violation was not committed with its knowledge and privity, and for the further reason that the violation did not contribute to the accident. The court below rejected each of these contentions, and its decision, we submit, was correct in all respects.

1. Section 2 of the Act of May 11, 1918, provides that no vessel in excess of 1,000 tons, such as the *Denali,* shall be navigated without a minimum complement of one licensed master and three licensed mates who shall stand in three watches. The petitioner concedes that under this section "the total time of navigating duty" must be divided equally among the three mates (Pet. Br., p. 5). Petitioner contends, however, that Section 2 applies only to the "mates" and not to the "pilot," and that the requirement of Section 2 is satisfied if the watch of any one mate does not exceed eight hours "on

the average," the only limitation on the number of hours in any one day being the 12 hours maximum prescribed by Section 3 of the same statute. Even in this view, petitioner violated the act, since, as the court below expressly found, the third mate, the one on duty at the time of the accident, and the second mate both stood watch in excess of 8 hours each day, and necessarily therefore in excess of "an average" of 8 hours each day (R. 5616).

Petitioner's construction of the statute, however, is plainly erroneous. The act in question is a safety measure, having as its object the protection of life and property at sea (*cf. O'Hara* v. *Luckenbach S. S. Co.*, 269 U. S. 364, 367; *McCrea* v. *United States*, 294 U. S. 23, 27), and the purpose of Section 2 is to insure the officers in charge of navigation against fatigue and exhaustion while on duty. This purpose would obviously be defeated if the three watch periods, which concededly must be equal, could be divided according to the "entire time of navigation," instead of each twenty-four hours. The 12-hour provision of Section 3 was not intended as the sole regulation of maximum daily hours. Section 3 applies to all licensed officers on the vessel, while Section 2 is a special provision applying only to the mates in charge of navigation.

The contention that Section 2 applies only to the "mates" and not to the "pilot" of the *Denali* is

clearly specious. Although Section 2 speaks only of "mates," the "pilot" of the *Denali* was obviously employed as a "mate" within the sense of Section 2. It cannot be supposed that different hours are prescribed by the act for navigating officers in charge of a watch depending on whether they are licensed as pilots or mates; it is the functions in which the navigating officers are actually engaged which must be determinative. Here the pilot was in responsible charge of the watch at the time of the accident, the third mate being merely his assistant. He was therefore performing the functions of a mate during his watch. And the failure to assign the first mate to a regular watch suggests that it was the intention that the pilot should perform these functions of a mate.

It should be added that the question whether petitioner violated Section 2 is no longer one of general importance. The Congress has since, by the Act of June 25, 1936, c. 816, 49 Stat. 1930, definitely established an 8-hour maximum day for all officers.

2. The court below held that since the vessel was improperly manned it was unseaworthy, that the petitioner had failed to show that the improper manning did not contribute to the accident, and that the petitioner was therefore not entitled to exoneration under the Harter Act. This conclu-

sion was plainly correct. *The New York Marine No. 10,* 109 F. (2d) 564, 566 (C. C. A. 2d); *The Rolph,* 299 Fed. 52, 54 (C. C. A. 9th); *cf. The Lady Pike,* 21 Wall. 1, 15.

The decision of the Circuit Court of Appeals for the Second Circuit in *Hartford & N. Y. Transportation Co.* v. *Rogers & Hubbard Co.,* 47 F. (2d) 189, relied upon by petitioner, is not in conflict. In that case the court held, as an alternative ground of decision, that a vessel was not unseaworthy merely because one of the seamen did not have a license as required by the ship's certificate, where it affirmatively appeared that the vessel was in fact competently manned, that the accident was unavoidable, and that it did not result from any defect of navigation or seamanship (*id.* at 191–192). In this case it is conceded that the accident was caused by faulty navigation, and under the rule of *The Pennsylvania,* 19 Wall. 125, 136, petitioner was required to show that the improper manning did not contribute to the faulty navigation. This, as the court below held, petitioner failed to prove. Petitioner suggests that the rule of *The Pennsylvania* should be applied to collisions only, but the principle announced in that decision is one of general application in the field of admiralty, and in particular has been applied in stranding cases. *Richelieu Navigation Co.* v. *Boston Ins.*

Co., 136 U. S. 408; cf. *Lie* v. *San Francisco & Portland S. S. Co.*, 243 U. S. 291, 298.[2]

The petitioner contends that in any event the violation of Section 2 was not willful, but was done in the bona fide belief that the division of watches was in accordance with the requirements of the statute, and therefore that the petitioner exercised "due diligence" to make the vessel seaworthy within the meaning of the Harter Act. The contention is without substance. Petitioner knew that the illegal practice was the customary method of operating its vessels. The fact that it believed the arrangement to be a proper one as a matter of law is, of course, immaterial. Diligence in this field, as generally, must be measured by an objective standard; whether petitioner exercised due diligence depends on whether it complied with the standard established by Congress, not on whether it believed that it had so complied. *The Pennsylvania*, 19 Wall. 125, 137; *cf. Barlow* v. *United States*, 7 Pet. 404, 410; *W. A. Hover & Co.* v. *Denver, etc., R. Co.*, 17 F. (2d) 881, 884–885 (C. C. A. 8th).

3. Petitioner was not entitled to limitation of liability, since the violation of Section 2 was com-

[2] It may be added that the court in *Hartford & N. Y. Transportation Co.* v. *Rogers & Hubbard Co.*, *supra*, held as an independent ground of decision that even if the vessel were unseaworthy, a causal relation must be shown between the unseaworthiness and the accident, a view which this Court has since expressly disapproved in *May* v. *Hamburg Etc. Gesellschaft*, 290 U. S. 333, 350–351.

mitted with its knowledge and privity, and petitioner failed to prove that this method of operation was not a contributing cause of the accident.

Petitioner's contention that the violation was not committed with its knowledge or privity, because it believed in good faith that the method of operating its vessels conformed to the statute, is without merit. The Limitation of Liability Act merely requires "knowledge" or "privity"; it does not require a "wilful" complicity in the sense of a deliberate intention to do what is known to be illegal. The cases cited by petitioner (*The Virginia,* 264 Fed. 986 (D. Md.), affirmed *sub nom. Hines* v. *Butler,* 278 Fed. 877 (C. C. A. 4th); *La Bourgogne,* 210 U. S. 95) are not in point. They merely hold that "negligence" alone is not enough. They do not hold that a customary practice, of which the owner is cognizant, is engaged in without his "knowledge" or "privity" simply because he believes the practice to be lawful.

Petitioner further contends that the court below erred in holding that it was required to prove that the violation "could not" have contributed to the accident. This holding was in accord with the rule of *The Pennsylvania, supra,* which, as we have shown, is of general applicability in admiralty cases.

CONCLUSION

The decision below is correct and is not in conflict with any decision of this Court or of any other

circuit court of appeals. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.

FRANCIS M. SHEA,
Assistant Attorney General.

MELVIN H. SIEGEL,
PAUL A. SWEENEY,
Special Assistants to the Attorney General.

RICHARD H. DEMUTH,
Special Attorney.

SEPTEMBER 1940.

APPENDIX

The Act of May 11, 1918, c. 72, 40 Stat. 548, 549 (46 U. S. C., Sec. 223), provides:

> SEC. 2. That the board of local inspectors shall make an entry in the certificate of inspection of every ocean and coastwise seagoing merchant vessel of the United States propelled by machinery, and every ocean-going vessel carrying passengers, the minimum number of licensed deck officers required for her safe navigation according to the following scale:
>
> That no such vessel shall be navigated unless she shall have on board and in her service one duly licensed master.
>
> That every such vessel of one thousand gross tons and over, propelled by machinery, shall have in her service and on board three licensed mates, who shall stand in three watches while such vessel is being navigated, unless such vessel is engaged in a run of less than four hundred miles from the port of departure to the port of final destination, then such vessel shall have two licensed mates; and every vessel of two hundred gross tons and less than one thousand gross tons, propelled by machinery, shall have two licensed mates.
>
> That every such vessel of one hundred gross tons and under two hundred gross tons, propelled by machinery, shall have on board and in her service one licensed mate, but if such vessel is engaged in a trade in which the time required to make the passage from the port of departure to the port

of destination exceeds twenty-four hours, then such vessel shall have two licensed mates.

That nothing in this section shall be so construed as to prevent local inspectors from increasing the number of licensed officers on any vessel subject to the inspection laws of the United States, if, in their judgment, such vessel is not sufficiently manned for her safe navigation: *Provided,* That this section shall not apply to fishing or whaling vessels, yachts, or motor boats as defined in the Act of June ninth, nineteen hundred and ten, or to wrecking vessels.

* * * * *

The Harter Act, c. 105, 27 Stat. 445 (46 U. S. C., Sec. 192), provides:

SEC. 3. That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.

Section 4283 of the Revised Statutes (46 U. S. C., Sec. 183) provides:

> The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

U. S. GOVERNMENT PRINTING OFFICE: 1940